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Mitigation and the Capital Defendant Who Wants to Die: A Study in the Rhetoric of Autonomy and the Hidden Discourse of Collective Responsibility

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There are instances when the doing of an act in the name of autonomy represents the very negation of it. Such is the case with a mitigation waiver.

INTRODUCTION

The defendant has been convicted of a capital offense. The litigants enter into the penalty phase, that phase of the capital trial where the defense has the opportunity to counter the prosecution's portrayal of the defendant as a vicious, cruel, remorseless killer who deserves to die; counter it with evidence about the defendant's particular life circumstances, his childhood traumas, his cognitive and emotional deficits, his drug and alcohol addiction, his poor education, his impoverished material and stunted emotional existence. His loves, fears, disappointments. His good deeds, too—should resourceful investigation and luck uncover them. The judge is committed to giving the defense wide latitude in its evidentiary presentation.[1] But the defendant announces, "I don't want my lawyer to do anything to try to save my life. I waive my right to present mitigation. It's my life. It's my case. *This is my case.* Let the prosecution do what it wants to do and the jury can vote to have me killed. I'm fine with that." The judge wants to say, *you can't do that, you don't have that prerogative*, because her first thought is that the defendant cannot thwart his lawyer's best efforts to present the best mitigation case possible.

But why can't he? Doesn't he have a point? It is *his* right, *his* case,

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1. "Wide latitude" is the appropriate judicial posture when it comes to admitting mitigation evidence. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 568 (2005).

after all. What if the defendant is seeking to express remorse, a craving for punishment associated with a crippling guilt that he feels can be expiated, if at all, only by capitulating to or endorsing the prosecution's quest for a death sentence?[2] If guilt is a stain, and punishment the cleansing of it, then what more personal decision is there than the defendant's voluntary submission to the process of punishment?[3] Aside from that, he could have opted to represent himself and thereby directly controlled what path to take in the litigation.[4] Why, then, short of finding him incompetent,[5] should the judge find that he ought to lose that authority to control the direction of his case simply because he wisely allowed himself to be represented by counsel? After all, clients dictate litigation goals; lawyers have the prerogative over how to accomplish them.

Still, our judge cannot shake the intuition that allowing the defendant to veto mitigation subverts the legitimacy—that is, the moral justifiability—of the entire capital-sentencing process.[6] Without a mitigation presentation and a robust adversarial contest, how is the jury

2. *See* PAUL RICOEUR, THE SYMBOLISM OF EVIL, 100–02 (Emerson Buchanan trans., 1969) (noting that a guilty person suffers a powerful feeling of unworthiness that generates a craving for punishment).

3. *See* George P. Fletcher, *Collective Guilt and Collective Punishment*, 5 THEORETICAL INQUIRIES IN LAW 163, 168–72 (2004) (discussing guilt as a "stain" to be cleansed).

4. It is often noted in this context that disallowing a defendant's veto of a mitigation presentation is incompatible with the right to self-representation, recognized in *Faretta v. California*, 422 U.S. 806 (1975). *See* United States v. Davis, 285 F.3d 378, 381 (5th Cir. 2002), *cert. denied* White v. United States, 537 U.S. 1066 (2002); *see also* Richard J. Bonnie, *The Dignity of the Condemned*, 74 VA. L. REV. 1363, 1385 (1988).

5. *See* Godinez v. Moran, 509 U.S. 389, 398–400 (1993) (competency standard for waiving counsel and pleading guilty is no different than the standard for competency to stand trial, even in a case involving a defendant seeking to volunteer for execution).

6. I will in this Article phrase what this hypothetical defendant seeks to do as a "veto" over a mitigation presentation or as simply a "mitigation waiver." I have in mind the capital defendant's desire to bar completely the jury's consideration of any mitigation evidence that could be adduced in the penalty phase of the capital prosecution. I do not include in this notion of *veto* those rare capital defendants who, after consulting with counsel (or, in the case of those defendants representing themselves, their back-up counsel, appointed pursuant to *McKaskle v. Wiggins*, 465 U.S. 168 (1984)), decide that the better *tactical* move is to present little or no mitigation evidence—perhaps out of fear that an evidentiary presentation will open the door to damaging prosecutorial evidence. Such a decision reflects not an abandonment of litigation, but the exercise of choice to enhance the chances of securing a non-death sentence. So, when a capital defendant decides with the aid of counsel not to present mitigation in order to shape an adversarial presentation with the hopes of *enhancing* the chances of a life verdict, the decision cannot be deemed a "mitigation waiver." Evaluation of that strategic or tactical decision is properly governed by the well-developed body of law springing from *Strickland v. Washington*, 466 U.S. 668 (1984). *See* Williams v. Taylor, 529 U.S. 362, 390–98 (2000). But there is a distinction between presenting no defense and presenting no evidence in support of a defense. A mitigation waiver, as I use the term, means the former, a veto over a mitigation presentation that constitutes an *abandonment* of the adversarial process, not a considered judgment over how best to take advantage of it. A mitigation waiver, in short, is a decision not to enhance the chances of securing a life verdict in lieu of a death sentence, but one made to accomplish the opposite.

to do its job? How, that is, can the jury arrive at a "reasoned moral" judgment about whether this human being should live or die?[7] Surely reliability in capital sentencing is no mere precatory aspiration for the sake of the defendant. With the sovereign right to execute as society's response to certain crimes, the state must ensure, *as a compelling interest of its own*, that the sentencing jury considers available mitigation evidence so it can, with appropriate moral judgment, decide the suitable sentence. The legitimacy of lethal punishment in fact depends upon it. So, though unquestionably true that the Constitution preserves the defendant's freedom to choose how best to handle his own case,[8] our judge can see that relying on the paradigm of free choice lops off one half of the equation: the sovereign's own interest in ensuring capital punishment's fair and reliable application. And she understands how deep that interest runs, for "taking the life of one of its citizens" is the ultimate sovereign act—the most extraordinary exercise of state power.[9]

It is a powerful intuition, this sense that a convicted capital defendant ought not be allowed to subvert the process in this fundamental way. But it runs headlong into that compelling intuition that more is at stake for the defendant than just preserving his right to control his case, that on the other side of the ledger is not just a legal right, that at bottom there is the powerful but murky notion of dignity, and associated with it, that slippery constitutional notion of the "right to be let alone."[10] The defendant may lose his life at the end of this juridical journey, but can we take away this remnant of his dignity to control his own personal destiny and thus to decide for himself that he does not want what is likely to be shameful facts about his life to be laid bare before the jury? Doesn't it all come down to respect for autonomy?

Let us call it the Autonomy Ideal, our judge's intuition about the defendant's right to control his own case and his dignity interest in not having the state force him on a course of action that might well deeply repulse him.[11] And let us call the countervailing intuition the Reliability Ideal. Our commitment to it is why the law governing killing-as-punishment is so complex and elaborate, byzantine even. The integrity of the capital-sentencing process demands the sovereign's commitment to

7. *See* Penry v. Lynaugh, 492 U.S. 302, 319 (1989).

8. *See Faretta*, 422 U.S. at 833–34.

9. Gardner v. Florida, 430 U.S. 349, 358 (1977).

10. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

11. Perhaps the best expression of the Autonomy Ideal in the criminal law is *Faretta v. California*, where the Supreme Court understood the right to self-representation to be an expression of "'respect for the individual which is the lifeblood of the law.'" 422 U.S. at 834 (quoting Illinois v. Allen, 397 U.S. 337, 350–51 (1970) (Brennan, J., concurring)); *see* Robert E. Toone, *The Incoherence of Defendant Autonomy*, 83 N.C. L. REV. 621, 653 (2005) (observing that a "few [commentators] have gone so far as to argue that *Faretta* represents the apex of the [Supreme] Court's respect for individual autonomy").

ensure that execution is reserved only for the truly worthy.[12] More than an aspiration, this is an irrevocable mandate under the Eighth Amendment.[13]

Our judge has to decide, it seems, between these two colliding ideals, autonomy versus reliability. Her research will reveal that in every jurisdiction except two—Florida and New Jersey—the former trumps the latter.[14] We can hardly find that surprising, since the Autonomy Ideal is entrenched not only in our legal culture—it is, after all, "the lifeblood of the law"[15]—but is sunk deep in our collective psyche. And that is why, we tend to say to ourselves, the entire trajectory of constitutional criminal procedure has been not only to favor the choice of waiving enforcement of constitutional rights, but to encourage it.[16] Even the most dubious "choice" to waive enforcement of a constitutional right is often regarded as a worthy expression of autonomy.[17] So the prevailing wisdom is that the Autonomy Ideal is very strong, even sacrosanct, rendering anachronistic the notion of barring a waiver of a constitutional right,[18] rendering it at best a quaint sentiment cutting against the grain of twentieth-century doctrinal development in constitutional criminal procedure.[19]

Commentators have struggled over this seeming collision of the Autonomy and Reliability Ideals.[20] But what has never been questioned

12. The principle can be stated clearly, though the nuances of the doctrine remain perplexing, if not contradictory: the crime alone, though it renders the defendant *eligible* for the death penalty, cannot be the sole basis for deciding that the defendant *ought* to get the death penalty (i.e., *worthy* of the death penalty). *See generally* Penry v. Lynaugh, 492 U.S. 302 (1989); Spaziano v. Florida, 468 U.S. 447 (1984); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280 (1976).

13. *See Lockett*, 438 U.S. at 602–05.

14. *See* Muhammad v. State, 782 So. 2d 343, 361–62 (Fla. 2001), *cert. denied*, Florida v. Muhammad, 534 U.S. 944 (2001); State v. Koedatich, 548 A.2d 939, 995, 997 (N.J. 1988).

15. Faretta v. California, 422 U.S. 806, 834 (1975). *See generally* HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 65 (1968); Hugh Gibbons, *Justifying Law: An Explanation of the Deep Structure of American Law*, 3 LAW & PHIL. 165 (1984) (autonomy at the root of American legal discourse).

16. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 243 (1973) (stating that the "community has a real interest in encouraging consent [to search]"). *See generally* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 4.02 (3d ed. 2002).

17. *See, e.g.*, United States v. Drayton, 536 U.S. 194, 207 (2002) (consent searches "reinforce[] the rule of law"); Minnick v. Mississippi, 498 U.S. 146, 155 (1990) ("Both waiver of rights and admission of guilt are consistent with the affirmation of individual responsibility that is a principle of the criminal justice system.").

18. *See* Hopt v. Utah, 110 U.S. 574, 579 (1884) (disallowing defendant's waiver of presence). *See generally* Albert W. Alschuler, *Plea Bargaining and Its History*, 13 LAW & SOC'Y REV. 211 (1979) (recounting how judges used to discourage guilty pleas).

19. *See* Toone, *supra* note 11, at 646–47.

20. *See generally* Bonnie, *supra* note 4; Linda E. Carter, *Maintaining Systemic Integrity in Capital Cases: The Use of Court-Appointed Counsel to Present Mitigating Evidence When the Defendant Advocates Death*, 55 TENN. L. REV. 95 (1987); Christy Chandler, *Voluntary Executions*, 50 STAN. L.

is the premise to the debate, that what is at stake is this collision between autonomy and reliability. I intend to show that framing the analysis this way blinds us to three things. One, it overlooks how the unique nature of the cruel-and-unusual-punishments clause calls for a different, stricter understanding of *waiver* in the Eighth Amendment context than in other constitutional contexts. Two, it obscures what we mean when we speak of *autonomy*, obscures even the fact that we may mean nothing substantial at all. And three, it discourages a reevaluation of the important question, *what exactly is the function of mitigation, and does that function imply that the state has an interest in something beyond the procedural guarantee that the capital defendant may present unimpeded whatever mitigation he chooses to present*?

On a broader thematic scale, I want to explore the thesis that the power of autonomy as an ideal resides in what we associate it with, not in how we might conceptualize it metaphysically. In that sense, autonomy is a slogan; indeed, a perfect slogan. It is a slogan because it appeals to us intuitively while being neither a precise nor static term. It is perfect because it captures a deep moral sensibility about what is properly valued in our criminal justice system. Our understanding of it necessarily derives from its use, watching it in action, if you will, seeing it used to justify normative claims and punitive actions, seeing how it connects and interplays with other loaded concepts, like freedom and dignity and responsibility. So the Autonomy Ideal is amorphous enough, interwoven tightly enough with other amorphous and grandiose notions, to be a powerful slogan.[21] And like all slogans, it masks more than it reveals. I want to focus on the mitigation-waiver conundrum not to suggest any

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REV. 1897 (1998); Julie Levinsohn Milner, *Dignity or Death Row: Are Death Row Rights to Die Diminished? A Comparison of the Right to Die for the Terminally Ill and the Terminally Sentenced*, 24 NEW ENG. J. CRIM. & CIV. CONFINEMENT 279 (1998); G. Richard Strafer, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. CRIM. L. & CRIMINOLOGY 860 (1983); Melvin I. Urofsky, *A Right to Die: Termination of Appeal for Condemned Prisoners*, 75 J. CRIM. L. & CRIMINOLOGY 553 (1984); Welsh S. White, *Defendants Who Elect Execution*, 48 U. PITT. L. REV. 853 (1987); Kathleen L. Johnson, Note, *The Death Row Right to Die: Suicide or Intimate Decision?* 54 S. CAL. L. REV. 575 (1981). Much of this scholarly literature is devoted to a form of death-volunteering that I do not consider in this Article—namely, death-row inmates who wish to abandon further litigation and submit to execution. The Supreme Court has never been receptive to the argument that this form of volunteering is constitutionally troublesome. *See generally* Demosthenes v. Baal, 495 U.S. 731 (1990); Whitmore v. Arkansas, 495 U.S. 149 (1990); Hammett v. Texas, 448 U.S. 725 (1980) (per curiam); Lenhard v. Wolf, 444 U.S. 807 (1979); Gilmore v. Utah, 429 U.S. 1012 (1976). The Court has never addressed head-on the issue of whether a capital defendant may volunteer for execution at the adjudicatory stage by vetoing a mitigation presentation. It has, however, addressed other issues involving such capital defendants. *See* Godinez v. Moran, 509 U.S. 389, 398 (1993); Blystone v. Pennsylvania, 494 U.S. 299, 307 n.4 (1990).

21. *See* Robert Young, *Autonomy and the "Inner Self,"* in THE INNER CITADEL: ESSAYS ON INDIVIDUAL AUTONOMY 77 (John Christman ed., 1989) (stating that "for all its importance and despite the frequency with which it is appealed to, the concept of autonomy generally operates at an intuitive level and rarely is seriously explored").

particular doctrinal program or to criticize judicial action, but to see one instance of how a rhetorical device masks how we should understand jury decisionmaking in capital prosecution.

The discussion will proceed as follows. Part I highlights how the Autonomy-Reliability dichotomy frames the mitigation-waiver analysis and how that framing leads us into an analytical cul-de-sac. Part II points to a different analytical path by showing why the law's penchant for accepting, and even encouraging, waivers of constitutional rights does not support the view that we ought to accept competent waivers of the right to present mitigation evidence. This discussion is intended to expose the notion of autonomy to be more "rhetorical flourish," an "illusion," than meaningful notion, as one commentator justifiably put it in the context of re-evaluating the wisdom of *Faretta*.[22] Part III gets to the heart of the matter, the unexplored facet of this issue. It questions the conventional understanding of mitigation evidence as a mercy-inducing device, a way to engender mercy for the capital defendant, thereby overcoming the jury's finding that he is eligible and thus deserving of death. This reexamination of mitigation's function is crucial to understanding why empowering capital defendants to veto in toto a mitigation presentation is fundamentally wrong.

My claim is this: The function of mitigation is far more profound than just provoking merciful sentiments. If mitigation's function, in its essence, serves to trigger the merciful impulses of the capital jury, then that fact strengthens the view that empowering capital defendants to veto a mitigation presentation is just another instance of our culture's honoring autonomy. But, I argue, an effective mitigation presentation introduces into the decisional mix matters that the capital defendant ought have no power to veto, ideas and sentiments of collective responsibility and guilt, considerations that deepen the concept of autonomy and thus enrich the moral nature of the jury's decisionmaking. While we applaud ourselves with the thought that our impulse to permit waivers of constitutional rights evinces our commitment to autonomy as a social good and collective virtue, the truth is that a meaningful inquiry into autonomy, *through evidence of mitigation*, is most essential in the capital-punishment context, where the jury must determine whether the "unique[] . . . individual,"[23] under the decisional glare of the jurors, ought to die for his crime.

We may receive a collateral benefit in this reexamination, apart from breaking through the conundrum of the mitigation-waiver issue. We may gain a heightened awareness of how *autonomy* becomes in a capital trial more than a mere slogan that rhetorically supports the moral

22. Toone, *supra* note 11, at 623, 655.

23. Lockett v. Ohio, 438 U.S. 586, 605 (1978).

infrastructure of the criminal law. We may become more attuned to the reality—and thus more open to discussing—that matters of collective responsibility, and even of collective guilt, inform criminal-law adjudication, even as we insist that the enterprise of punishment is quintessentially an exercise in assigning *individual* blame.

I. THE FALSE AUTONOMY-RELIABILITY DICHOTOMY

Commentators disagree on whether a capital defendant should be allowed to veto a mitigation presentation in the penalty phase.[24] What they agree on are three things: (1) a capital sentencing jury must consider mitigation evidence presented at trial, (2) a capital defendant cannot be impeded in presenting mitigation evidence, whether by evidentiary ruling, prosecutorial misconduct, or defense counsel's dereliction, and (3) a mitigation waiver involves the collision between the Autonomy Ideal and the Reliability Ideal. They may even agree on a fourth proposition, that because "death is . . . different,"[25] what is legitimate or countenanced in a non-capital context does not perforce mean that the action or judgment is permitted or countenanced when death is a possible punishment.

The death-is-different theme is the main argumentative platform for those who advocate against capitulating to a capital defendant's purported desire to veto a mitigation presentation.[26] This or some other distinguishing feature of capital jurisprudence is essential here because the general ethical rule is quite plain: "the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself."[27] Anti-waiver advocates, as I shall call them, pursue the claim that "[p]ermitting a defendant to waive or forego the presentation of mitigating evidence defeats the public's interest [in reliable capital sentencing] inherent in the eighth amendment."[28] They argue that limiting a defendant's right to waive constitutional protections is appropriate when society's interest in systemic integrity of the judicial process outweighs the countervailing autonomy interests.[29] The fact-value leap, the jump from *is* to *ought*, is undertaken with unshakeable confidence: because "death is different," because mitigation evidence is so vital to reliable capital sentencing, because society's interest in

24. *See supra* notes 4, 20.

25. Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

26. *See, e.g.*, Carter, *supra* note 20, at 110; Strafer, *supra* note 20, at 876–85.

27. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-8 (1980); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (1983) ("A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued.").

28. Carter, *supra* note 20, at 127–28.

29. *Id.* at 127.

limiting executions to the truly death worthy is so immense, a defendant ought not be allowed to veto a mitigation presentation.

This line of thought, seductive as it is at first glance, is pure question-begging. What process does the Reliability Ideal demand? Indeed, what do we mean by "reliable" capital sentencing, when all agree it is impossible to articulate a neutral standard by which to say that a particular capital sentencing judgment is right or wrong? And if we cannot say what we mean by "reliable," then how can we say with any precision what society's reliability interest actually is? Why must the Reliability Ideal be vindicated by nothing short of forcing a mitigation presentation on someone who doesn't want it?[30]

Anti-waiver advocates assume without proving that the Reliability Ideal is vindicated only when a mitigation presentation is actually made. This is a contested point, and thus must be argued for. True, the societal interest in sentencing reliability is immense; true, also, a capital-sentencing jury must consider available mitigation evidence as part of its Eighth Amendment function. But these uncontested propositions, in themselves, do not prove that the Reliability Ideal trumps the Autonomy Ideal. Nor does the death-is-different mantra dictate that every legal issue implicating the reliability of the sentencing process will be decided only and always to enhance reliability.[31] There is an inadequately argued fact-value leap, a leap from the *is* (society has a reliability interest) to the *ought* (mitigation evidence *ought* to be presented to the jury, no matter what a capital defendant may desire). Put another way, that mitigation is indisputably *important* in capital decisionmaking does not mean it is *necessary* in a legal or constitutional sense (a value that is precisely at issue in the mitigation-waiver controversy). Exposing the illegitimate fact-value leap highlights why the anti-waiver argument, as typically articulated, amounts to an opinion, a subjective weighing of the competing ideals that gives inadequate regard to the dignity interests of the capital defendant.[32]

Consider in this light the Ohio Supreme Court decision of *State v.*

30. In considering these questions, we must remember that the capital defendant's veto of mitigation does not amount to dispensing with the penalty-phase process itself, or of the jury's assessment of the facts of the crime (the aggravating factors) and whatever mitigating circumstances that might surface within that assessment (including observations of the defendant and his supporters in the courtroom—not an incidental consideration, as any skilled capital defense lawyer knows), or its deliberation over the question of life imprisonment or death after hearing instructions from the trial judge. The capital defendant's veto of mitigation does not amount to dispensing with the State's obligation to prove that the defendant is indeed qualified under the law to be executed.

31. For two notorious examples that prove the truth of this fact, see *McCleskey v. Kemp*, 481 U.S. 279 (1987), and *Barefoot v. Estelle*, 463 U.S. 880 (1983).

32. *See* Bonnie, *supra* note 4, at 1376–77 (arguing that the "prisoner's dignity stands against the dignity of the law").

Ashworth.[33] The defendant there pled guilty to capital murder and "waive[d] the presentation of mitigating evidence so that he would be executed."[34] On appeal, the defendant argued that he should not have been allowed to waive mitigation because Ohio's capital statute and the Eighth Amendment mandate that the jury consider mitigation evidence.[35] The court agreed with the anti-waiver proponents' cardinal principle that society has a weighty interest in reliable capital sentencing. But that interest, the court reasoned, is vindicated by a process that adequately winnows out those who are not qualified to receive the death penalty.[36] And so, when the defendant chose not to avail himself of the opportunity the Ohio statute and the Eighth Amendment granted him, he was doing nothing more than exercising his autonomy, not undercutting the state's reliability interest. To suggest otherwise, as the anti-waiver proponents do, is to posit without offering the necessary justificatory arguments that the state's reliability interest necessarily entails something more than holding a fair trial where both the defendant's qualification to receive the death penalty is reliably determined and the defendant's opportunity to present evidence showing why death nonetheless ought not be imposed is unimpeded.

The validity of what I will call "the *Ashworth* thesis" is nourished by two sources of thought. First, that waivers of constitutional rights are more than tolerated in our legal culture; they are emphatically encouraged as an expression of our culture's reverence for the Autonomy Ideal. And second, mitigation functions as a device to engender mercy. Under this understanding of mitigation's function, the decision whether to advocate for life in the penalty phase does not implicate the sovereign's independent reliability interest, but only the individual's personal prerogative to seek mercy—a matter ripe for waiver in our legal culture of flourishing waivers.

But is it true that our flourishing waiver doctrine expresses our commitment to the ideal of autonomy? And is it true that in its essence mitigation functions chiefly as a means to evoke from the jury a merciful sentiment so strong that it will spare the life of the defendant. To these questions, in that order, we now turn.

II. THE EIGHTH AMENDMENT AND THE LIMITATIONS OF WAIVER

Tied to our philosophical fidelity to the Autonomy Ideal, the impetus for permitting capital defendants to waive mitigation, is the

33. 706 N.E.2d 1231 (Ohio 1999).

34. *Id.* at 1235.

35. *Id.* at 1236–37.

36. *Id.* at 1238 ("'[R]equired reliability is attained when the prosecution has discharged its burden of proof at the trial and penalty phases pursuant to the rules of evidence and within the guidelines of a constitutional death penalty statute . . . .'").

indisputable fact that waivers of constitutional rights are commonplace.[37] You are free to say *thanks, but no thanks* to the most basic and precious of constitutional rights. You may insist on your right to privacy but decide to let the government search your car, your luggage, your home, even your body. You may insist on your right to silence but nonetheless choose to explain in elaborate detail how you in fact committed the horrible crime that the detectives suspect you of committing. You may forego opportunities to testify at your trial, cross-examine witnesses, object to evidence, argue points of law to the judge and matters of fact to the jury; you and your lawyer may sit mute as the prosecution mounts a case against you. You may even consent to an adjudication of guilt without the ritual of trial, a waiver of a medley of rights.

We live in a legal culture where waivers of constitutional rights flourish even though society must remain committed to enforcing those rights. Indeed, waiver itself can be treated as a right in itself, one among the positive constitutional rights associated with the Fourth, Fifth, and Sixth Amendments.[38] Society's enforcement obligations, in many respects, hinge on the individual's choice to invoke those rights. That we as a society benefit from waiver decisions, or at least are not diminished by them, reinforces the utilitarian analysis to allow them without much hand-wringing. You need only think of plea bargains to see the point. The system would collapse if this did not happen routinely.

We allow waivers to permit what would otherwise be unconstitutional governmental action because, we like to tell ourselves, the preeminent value we place on the power to *choose* demands that "we permit our citizens to choose whether or not they wish to exercise their constitutional rights."[39] Without contradiction, then, a flourishing waiver doctrine coexists within a legal system that openly commits itself to enforcing constitutional rights. And at the heart of this coexistence is the notion of autonomy.

A. The Concept of Autonomy

The ideal of autonomy, we have seen, drives the mitigation-waiver analysis. That ideal is expressed in our talk of *free choice, dignity, control over personal decisions, control over one's life or fate or destiny*—locutions that define the way we think about the mitigation-waiver conundrum. These locutions define the way we think about mitigation waiver because we treat the decision to veto a mitigation presentation as a form of consent, and the concept of consent gains its justificatory power

37. *See generally* Dressler, *supra* note 16, at § 4.02 ("Virtually any constitutional right may be waived by a criminal suspect or defendant during a criminal investigation or prosecution.").

38. The *Faretta* right of self-representation is a prime example, as is the right not to testify. Both involve waivers of rights.

39. Schneckloth v. Bustamonte, 412 U.S. 218, 283 (1973) (Marshall, J., dissenting).

by its association with the ideal of autonomy and the moral foundations of human dignity.[40] And yet very little is offered to elucidate what the concept of autonomy means.[41]

Autonomy, for present purposes, is expressed in three interrelated ways: the power to waive rights, the power to control one's own destiny, and the power to insist on being left alone. I say *interrelated* because often these are compressed as a single idea: the power to waive can be understood as a manifestation of the power to control one's own destiny, and the power to control one's own destiny implies a zone of privacy where one is entitled to be left alone, free of government intrusion. I will later disentangle these three expressions of autonomy to better understand the doctrinal underpinnings to the mitigation-waiver debate. But for now, suffice it to say that they are powerful notions, and the Court in *Faretta* was right to observe that free choice—a phrase designed to capture the essence of what we mean by *autonomy*—is "the lifeblood of the law."[42]

1. Autonomy in Action: A Case Study

Perhaps the best exemplar of the compression of these three expressions of autonomy is the *Faretta* doctrine. A defendant's request for self-representation under *Faretta* entails a waiver of the right to counsel; that waiver is justified by a constitutional interpretation of the Sixth Amendment that the fundamental rights associated with defending against criminal accusations are *personal* to the defendant—*personal*, because presumptively innocent defendants, like all free persons, have an autonomy right to control their own case—and the foisting of unwanted counsel upon defendants who wish to waive their right to counsel intrudes upon a private realm of the individual that must be protected to give meaning to the autonomy right to control not just one's own court case, but by extension, one's own destiny.

To see how much traction these ideas have in the mitigation-waiver context, let us look at the Fifth Circuit's decision in *United States v. Davis*,[43] perhaps the most illuminating mitigation-waiver decision in this regard, since it forthrightly reasons that presenting a mitigation case over a defendant's objection paternalistically interferes with individual autonomy.[44] There, the trial judge allowed the capital defendant to

40. *See* Peter H. Schuck, *Rethinking Informed Consent*, 103 YALE L.J. 899, 900–01, 939 (1994) (noting how consent is understood as promoting autonomy and expresses the "primacy of individualistic values in our culture").

41. *See* Young, *supra* note 21, at 77 (noting that the notion of autonomy remains largely "unexplored").

42. Faretta v. California, 422 U.S. 806, 834 (1975).

43. 285 F.3d 378 (5th Cir. 2002).

44. Many courts avoid the mitigation-waiver conundrum by packaging the issue as simply a question of effective assistance of counsel. *See, e.g.*, Roberts v. Dretke, 381 F.3d 491, 499–500 (5th Cir.

advocate for his own death, but appointed independent counsel—amicus counsel—to present the best mitigation case possible, with due account for the difficulties and impediments arising from the defendant's pro-death position.[45] The Fifth Circuit on interlocutory appeal reversed the trial judge's ruling, holding that the involvement of amicus counsel advocating for a life sentence violates the *Faretta* doctrine because it would impermissibly undercut the defendant's personal desire to achieve his aim of receiving a death verdict.[46]

What is illuminating in the *Davis* opinion is the shallow acceptance of autonomy as an animating ideal. The power of that ideal overwhelmed what should have been obvious. The right to self-representation derives from the right to fashion one's own defense, something Mr. Davis could do. The amicus solution that the Fifth Circuit rejected as inconsistent with *Faretta* in no way foisted onto Mr. Davis an unwanted defense or litigation posture. Mr. Davis was free during the penalty-phase proceeding to press vigorously for his pro-death position, and he could use his unfettered autonomy to denounce amicus counsel from start to finish. The amicus solution simply paved the way for another point of view to be presented in the penalty phase, one that the jury would undoubtedly benefit hearing from. *Faretta* does not entail the right to silence alternative points of view that the law deems worthy, if not essential, for consideration. By confusing the defendant's *ability to control his own case* with the separate question whether any evidence should be presented in a penalty trial—a question that is preeminently one of public policy as embodied in constitutional construction and not subject to the personal whim of a convicted capital defendant—the *Davis* court's reasoning effectively allows the pro se defendant to wrest control from the state in its effort to ensure reliable capital sentencing.

Furthermore, the autonomy justification for recognizing the right to self-representation is not, in itself, evidence of its weight as a positive virtue. It remains a highly disfavored doctrine. We see this most clearly when we compare it to the primary right to be represented by counsel. A suspect must be told, before being interrogated, that he has a right to counsel, and if he invokes the right to counsel, all questioning must cease.[47] If he is charged, he is automatically entitled to counsel.[48] But a person need not be told of his right to represent himself. He could go

2004); Singleton v. Lochhart, 962 F.2d 1315, 1322 (8th Cir. 1992); Autry v. McKaskle, 727 F.2d 358, 361–62 (5th Cir. 1984); Trimble v. State, 693 S.W.2d 267 (Mo. Ct. App. 1985); Zagorski v. State, 983 S.W.2d 654, 657–59 (Tenn. 1998).

45. *Davis*, 285 F.3d at 380. Professor Carter advocates this amicus solution. *See* Carter, *supra* note 20, at 149.

46. 285 F.3d at 384–85.

47. Edwards v. Arizona, 451 U.S. 477, 484–85 (1981).

48. Gideon v. Wainwright, 372 U.S. 335, 343–44 (1963).

through the entire criminal process without once being apprised of his right to self-representation. Indeed, under *Faretta*, a trial court should *discourage* the exercise of the right to self-representation by warning the defendant of the pitfalls of self-representation.[49] Such discouragement is unthinkable when it comes to the right to counsel. Moreover, while it is easy to lose your right to self-representation, it is hard to imagine how one could lose the right to counsel, short of asserting a valid waiver. The right to counsel is part of the structural guarantee of the criminal process; the right to self-representation is an anomaly in the process that we grudgingly accept.

This means that the right to counsel is paramount to the right to proceed pro se. And here is what is significant about that. The right to counsel is rooted in the sovereign's overarching interest in reliable outcomes, not in vindicating some personal interest of the defendant.[50] So, within the very structure of the Sixth Amendment there is a decided tilt towards the sovereign's independent interest in reliable outcomes.[51] Properly understood, the *Faretta* right gives a defendant the ability to control his own case within the parameters of the adversarial process. A defendant cannot use the *Faretta* right to undermine or make a mockery of the adversarial process. After all, *Faretta* derives from the Sixth Amendment; it would be odd to allow a right flowing from the Sixth Amendment to be used to undercut the overarching purpose of the Sixth Amendment, which is the preservation of the adversarial process. When a capital defendant is allowed to waive mitigation in the spirit of *Faretta*, that defendant is using a Sixth Amendment doctrine to make a mockery of the adversarial process by sabotaging it.

The superficial thinking in *Davis* epitomizes the enormous power the Autonomy Ideal has on the legal mind. The rhetoric of autonomy is so powerful, so seductive, that framing the issue as one involving a *waiver* or *consent* ineluctably leads us down a path of empowering the capital defendant to veto a mitigation presentation. The trajectory of the law, for over a hundred years, has been to allow defendants to waive their rights, and that allowance fits comfortably within our socio-political and cultural ideas about free choice, control of one's destiny, and autonomy generally. So, to suggest that defendants may not waive procedural rights, that they will be enforced against their will, is to paddle upstream on a mighty river. And this is particularly true when we add in the fact

49. Faretta v. California, 422 U.S. 806, 835 (1975); *see* Johnson v. Zerbst, 304 U.S. 458, 465 (1938) (stating the trial judge has "serious and weighty responsibility" to protect against improvident waiver of counsel).

50. *See Gideon*, 372 U.S. at 344.

51. This tilt comes to the fore in Martinez v. Court of Appeal of Cal., where the U.S. Supreme Court held that a defendant does not have a constitutional right to self-representation on appeal, in part because the defendant is no longer presumed innocent. 528 U.S. 152, 162 (2000).

that the purported choice to veto a mitigation presentation derives from the highly personal, if not sacred, determination of the worth of one's own life and how, given the constraining circumstances, one would prefer to live it.

But once we scrutinize the concept of autonomy, rather than deploy it rhetorically, we can see that it holds far less power in the mitigation-waiver analysis. Analyzing the law's rapid and expansive embrace of waiver, we see that wrapping waiver in the philosophical garb of autonomy is a myth—in this context, a myth in the service of suppressing destabilizing conversations about capital jurisprudence, and as we shall ultimately see, about individualized versus collective responsibility and guilt.

2. A Short Discourse on Autonomy

The value we place on autonomy has never been grounded in simplistic utilitarian arguments of who is in the best position to evaluate and choose what course of action an individual might take.[52] Autonomy has value not because we have evaluated who is best to decide personal matters; autonomy has value because we regard the choosing itself as crucial to our being in the world, our *connectedness* to social life.[53] Choosing is integral to dignity, and to deny choice to another regarding matters of personal concern risks denying the other the status of *person*.[54] Let us unpack this intuition.

Its literal meaning evokes its implications: autonomy literally means self-governance, a word derived from the Greek, *self* and *law* or *rule*.[55] Self-governance has always been an integral part, if not the core notion, in any sophisticated understanding of autonomy.[56] Sometimes this core notion is used only as an ideal type to defend the existence of what I call

52. *See* MEIR DAN-COHEN, HARMFUL THOUGHTS 154–57 (2002); RONALD DWORKIN, LIFE'S DOMINION, 222–25 (1993).

53. *See* DAN-COHEN, *supra* note 52, at 135 ("[T]he ideal of autonomy, as commonly understood, is bound up with the idea of choice.").

54. *See* IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS, 98–108 (Harper Torchbooks, H.J. Paton trans. 1948) [hereinafter, KANT, GROUNDWORK]. The philosophical conception of the person as a being who *chooses* is an essential harmonizing idea in American jurisprudence. *See, e.g.*, BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 272 (1977); CHARLES FRIED, RIGHT AND WRONG 8–9 (1978); RICHARD POSNER, THE ECONOMICS OF JUSTICE 48–115 (1981). *But see* DAN-COHEN, *supra* note 52, at 125–45 (arguing that autonomy is more about "willing" than about "choosing").

55. *See* LAWRENCE HAWORTH, AUTONOMY: AN ESSAY IN PHILOSOPHICAL PSYCHOLOGY AND ETHICS 11 (1986).

56. *See* KANT, GROUNDWORK, *supra* note 54, at 98–102. To Kant, the *will* is a lawgiver, for the "[i]dea of the will of every rational being [is] . . . a *will which makes universal law*." *Id.* at 99; *see also id.* at 100 (the rational agent is "subject only to *laws which are made by himself* and yet are *universal*"). True morality, therefore, is a form of self-governance. *See* DAN-COHEN, *supra* note 52, at 135. Individual autonomy is, in fact, a political metaphor, as the concept of autonomy was most likely originally applied to states and institutions. JOEL FEINBERG, HARM TO SELF, ch. 18 (1986).

an *immunity zone*, a space for the individual to make choices free from governmental intrusion. The idea is that an immunity zone allows for the exercise of individual self-governance. Autonomy as an immunity zone is important insofar as it promotes the psychological conditions for self-governance.

Within the immunity zone is where preferences are formed. And preferences can reflect what philosophers call lower- and higher-order desires (sometimes phrased as first- and second- and third-order preferences, and so on).[57] A lower-order desire is the desire to do something—say, the desire to smoke a cigarette. It is the most concrete form of desire. A higher-order desire is the desire to desire something, wanting what you want. Our smoker who would like to quit, then, would have a conflict between the lower- and higher-order desires: she wants a cigarette, but she doesn't want to want it. She'd prefer not to have that desire. This distinction, even in its simplistic form as presented here, introduces the important idea of authenticity. Authenticity is the process of identifying one's desires and endorsing them.[58] Our smoker's autonomy is inauthentic when it comes to smoking because the first-order desire, as real and compelling as it is at the level of psychology, is not endorsed by the smoker's deeper self. The deeper, more reflective self—that part of the human personality that reflects upon and chooses to endorse or not endorse as desirable the more immediate desires—is at war with the desiring self. The aspiration for true self-governance involves the aspiration to merge lower- and higher-order desires. This is an aspiration for authenticity.[59] For when you want what you want, when your immediate desires harmonize with your deeper, reflective self, you are living authentically.[60]

Authenticity leads us to notions of freedom. Freedom and autonomy, though not the same, are closely interrelated. They are closely

57. *See generally* Harry G. Frankfurt, *Freedom of the Will and the Concept of a Person*, *in* THE INNER CITADEL, *supra* note 21, at 63–74.

58. *See generally* Gerald Dworkin, *The Concept of Autonomy*, *in* THE INNER CITADEL, *supra* note 21, at 59; Henry Frankfurt, *Identification and Externality*, *in* THE IMPORTANCE OF WHAT WE CARE ABOUT (1988).

59. *See* CHARLES TAYLOR, THE ETHICS OF AUTHENTICITY 25–29 (1992). The way Kant speaks of autonomy harmonizes with this linkage to authenticity. He argues that his Categorical Imperative—the imperative to *act as if the maxim* of your action were to become through your will a universal law of nature—is not merely a command to *follow* a universal law based in pure reason, but to follow a universal law which we ourselves make as rational agents and one which we ourselves particularize through our maxims. KANT, GROUNDWORK, *supra* note 54, at 98–99. To Kant, morality is an expression of our true selves—in my locution, our *authentic* selves—as rational agents. *Id.* *See* Young, *supra* note 21, at 78–79.

60. *See* TAYLOR, *supra* note 59, at 25–29. Taylor says that the pursuit of authenticity "accords crucial moral importance to a kind of contact with myself, with my own inner nature . . . ." *Id.* at 29. That "inner nature"—*inner voice*, if you will—is perennially threatened by pressures for conformity and capitulation, forces that squelch one's "capacity to listen to this inner voice." *Id.*

interrelated because of the importance of authenticity to any sophisticated understanding of autonomy. The effort to merge lower- and higher-order desires is a process of the deeper, reflective self identifying with its desires, taking ownership of them, turning them into ingredients of one's identity as a person. Authenticity, understood this way, implies, at the very least, that this process of identifying with one's desires is uncoerced. Any adequate notion of freedom and autonomy must recognize not just the freedom to *do* what one wants (freedom to smoke), but also being able to *want* what one wants (power of self-governance). So, autonomy in its structural aspect, in the way it brings together notions of authenticity and freedom, necessarily entails both a view about how a person must regard her preferences and a concern for how those preferences are formed.

We should bring into the open one other aspect to the structural understanding of autonomy. If we understand authenticity to involve the harmonizing of lower- and higher-order desires, then we must include in our understanding of autonomy not just freedom but *evaluation* as well.[61] For self-governance, understood as a process of harmonizing lower- and higher-order desires, requires evaluating those desires. And evaluation implies the capacity to disentangle the different levels of desire. The general idea is that the state has greater prerogatives in intruding into the immunity zone when the capacity of the individual is diminished. And it is in that sense that competency as a legal concept is a device for allocating power not among individuals within a judicial proceeding, but an allocation of power between the individual and the state.

This structural understanding of autonomy—autonomy as built upon the idea of authenticity, freedom, and capacity for evaluation—leads towards an investigation into one view of why life is sacred. Authenticity and freedom imbue autonomy with a robust meaning because they speak to the formation of preferences and desires from a rational (not necessarily wise) uncoerced, self-reflective vision of one's life as a thematic unity. Authenticity and freedom—and hence, autonomy—suggest a pursuit of coherence, of integrity in one's character and life. It is in that sense that autonomy implies *connectedness*, an individual's sense of feeling connected to the collective, to the family, the community, the society at large.[62] We understand this as a matter of intuition. That is

61. *Cf.* THOMAS NAGEL, THE VIEW FROM NOWHERE 119 (1986) (noting the limits of an individual's capacity for evaluation); ROBERT NOZICK, THE NATURE OF RATIONALITY 140–41 (1993) (specifying conditions for rational preference formation, thus implying a standard of self-critical evaluation as a condition for autonomous activity).

62. *Cf.* Susan Wolf, *Sanity and the Metaphysics of Responsibility*, *in* THE INNER CITADEL, *supra* note 21, at 144–45 (discussing sanity, and the desire to be sane, as desiring "that one's self be connected to the world in a certain way," and positing that connectedness to the real world is what legitimates the idea of responsibility).

why we are inclined to say that when one acts out of character, that person is being inauthentic, phony, not real, and in more extreme cases, regarded as disconnected from reality. That is why quality novelists and movie-makers and storytellers obsess over the integrity of each scene—a false move by a character, a discordant utterance, and the carefully crafted fictional dream has burst. That is why we put such a premium in a free society on the ideal of freedom of conscience: freedom of conscience is the freedom to author one's own life, the opportunity to be authentic, and thus the opportunity to be autonomous. That is why we remove from the criminal justice apparatus the criminal acts of the insane: those acts, we believe, do not express the character of the actor; they are acts perpetrated by persons who are disconnected from the real world and thus by persons who are not autonomous.

To be autonomous. We have moved from a static notion to a dynamic one. Autonomy is not just an ascriptive attribute, a right to be let alone. It is not simply a notion that calls to mind a barrier between the individual and the state—an immunity zone, as I have called it. It is an aspiration that speaks to what it means to be human: it speaks to the importance of *connectedness*, the entwining of the self and the collective; it speaks to what we mean when we say that life is sacred; it speaks to why we feel more than just irked when there is an intrusion into our ability to choose how best to author our own lives, why we feel in such instances personally violated, why we regard as under assault our very personhood. We have a dynamic notion because autonomy is about navigation, not about status. We are not merely autonomous beings. We grow into it, navigate towards it, in a world of powerful forces.

Life, of course, does not always permit freedom to do what one wants. It would be empirically vacuous to equate freedom and autonomy. The healthy individual's acquisition of greater and greater responsibility as he or she moves through adolescence into adulthood cultivates the capacity and the freedom to navigate through life, through the various institutional, social, political, circumstantial forces that are often beyond the individual's immediate control. The sacredness of the navigation resides in the importance it bears in bringing thematic unity, coherence, and integrity to living.

And so we come to *dignity*. For what else is this right to live in such a way? What else do we call an intrusion into the ability to author one's life but an assault on dignity? To link autonomy and dignity in this way is to embrace a vision of the autonomous self as mutable, revisable, subject to change and refinement through grace, reflection, and critique. If the self is nothing more than a brute fact, one's attributes and characteristics (one's character) implanted in the individual, then it would make no sense to speak of autonomy in the dynamic sense suggested here. We could speak of freedom, but our talk of dignity would be corrupted. It is

precisely in our understanding of the self as not a brute fact, but more akin to an aesthetic presentation to the world, that allows us to speak so honorifically about autonomy, to link it so tightly with dignity, almost to the point where the terms become in legal analysis interchangeable. But as we shall see, when we discuss in more detail what is meant by "mitigation" in capital punishment litigation, this aesthetic quality of the self forces us to embrace the importance of capacity to evaluate whether how we are is how we want to be.[63]

We value autonomy, then, because it elevates us above the vacuity of mere freedom to do what we want to do as a first-order desire. Freedom to act does not compel us to get beyond first-order desires, and for that reason it cannot accord us with the sort of human dignity that we insist upon. A robust understanding of autonomy does that: it forces us to go into second- and third-order desires, and beyond; it forces us to acknowledge the evaluative process that the self must engage in, which in turn draws us into the notion of a deeper self; and that deeper self is one that arises from an engagement with the world, a *connectedness* to the collective. This injection into our thinking of the self's connectedness to the collective is what allows us to see why *dignity* must not be wedded to some mythic idea of the isolated self. There is something here that is worth exploring about the criminal process. Autonomy, not just intentionality or freedom of the will, is key to understanding the criminal justice process because punishment is more than just inflicting pain and stripping liberty for an abuse of freedom, for the unjustified seizing of advantage outside the rules of civil society; punishment is justified because the perpetrator has expressed his character, something that is beyond a mere psychological state. It is autonomy, not mere freedom of the will—autonomy that contains within it the idea of the self's connectedness to the collective—that gives moral justification to punishment. And that is why autonomy—the key idea to individual responsibility and guilt—ultimately opens up the notion of collective responsibility and guilt, which will prove crucial to our reconceptualizing mitigation.

But for the moment, let us be content to observe that with this aerial view of the concept of autonomy we have no difficulty seeing how and

63. This leap from *is* to *ought*—the leap from how we *are* to how we *want to be*—accords with our intuitions because we do in fact place greater value in actions that spring from desires rooted in rationally-arrived at values than those that are not. This means that autonomy in its most meaningful sense is preference-formation derived from values reflectively conceived, as opposed to implanted or inherited, and thus central to aesthetic integrity in life—which is to say, integrity-in-action, understood as a commitment to one's values. *See* DAN-COHEN, *supra* note 52, at 135; DWORKIN, LIFE'S DOMINION, *supra* note 52, at 224. Religious traditions build on this aesthetic understanding of life, and in that limited sense, autonomy as an ideal is virtually universal.

why autonomy is regarded as the "lifeblood of the law"[64] and why we revere the notion—why we get opinions like *Davis*; why, indeed, the notion gets imported into an analysis of mitigation waiver and literally overpowers the countervailing incentive to maximize the reliability of the capital-sentencing process.

B. Waiver and Consent; Consent and Autonomy

Consent and waiver might be seen as flipsides of the same coin.[65] Though I regard this observation as too simplistic, it at least captures what I regard as important for present purposes, that waiving a constitutional right means consenting to a particular legal state of affairs.[66] When we speak of consent, we are speaking of one of three things: (1) a subjective condition, a state of mind, an internal attitude towards some event or state of affairs; (2) a granting of permission, an expression of acquiescence or willingness for some event to occur or some state of affairs to come about; or (3) a combination of these two. In what sense we use the term *consent* depends on the function we want it to serve. [67]

The function of consent in the context of mitigation waivers requires that we speak of it in the second sense, as a form of expression, which is to say, a granting of permission.[68] Consent-as-permission (the expression of consent) is significant precisely because, in a legal context, it performs a kind of "moral magic."[69] When an expressive act of granting permission

64. Faretta v. California, 422 U.S. 806, 834 (1975) (quoting Illinois v. Allen, 397 U.S. 337, 350–51 (1970) (Brennan, J. concurring)).

65. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 235 (1973) (voluntary consent sometimes understood as a waiver of Fourth Amendment rights).

66. We must put to one side the notion of *waiver* as a device to produce finality in litigation. Waiver of this sort is different than waiver as an expression of considered choice. Waiver as a finality-producing device speaks to the requirement that litigants follow the rules of procedure, the orderly processes of litigation. It also has the other function of allowing courts to avoid review of legal claims, and it is a malleable enough device that it gives courts the ability to decide when to decide an issue. No one suggests, so far as I can tell, that waiver in this context has much to do with autonomy.

67. For example, consent as a mental state, an attitudinal proposition, helps to demarcate sexual assaults from other acceptable sexual activity, and in that regard functions as a tool for discerning social harm. Consent as a form of expression may help to demarcate criminal sexual aggression from acceptable sexual force (that is, the dividing line between force that is criminal and force that is inherent in acceptable sexual activity), and in that regard functions as a tool for evaluating the accused's culpability where there is evidence of subjective nonconsent on the part of the complaining witness.

68. Subjective considerations are beyond our present concern inasmuch as those considerations bear on a defendant's *competency* to consent and his *sincerity* in doing so. Those considerations presuppose that mitigation waivers ought to be permitted, the very thing we are now investigating.

69. Heidi Hurd, *The Moral Magic of Consent*, 2 Legal Theory 121, 124–25 (1996). *See generally* Don Herzog, Happy Slaves: A Critique of Consent Theory 215–33 (1989). Though I use Professor Hurd's evocative phrasing, "moral magic," I understand that her conceptualization of consent differs markedly from that offered here. She understands consent to attain its "magical" powers from the subjective mental state of the person proffering the consent. *See* Hurd, *supra*, at 137 ("The magic that

is deemed "consent" under the law, we must understand the law to be saying that that act—a "speech act"[70]—has changed the relationship between persons, and that the change in relationship is backed up by the power of the state (i.e., the change is judicially enforceable).

Consent, then, grants permission, enforceable by the state, that something may be done to the person consenting that otherwise may not be done. When a capital defendant waives mitigation, he is consenting (read: granting permission) to undergo a penalty-phase process where the jury will not receive evidence that most knowledgeable observers and all capital defense lawyers regard as vital in death-penalty decisionmaking. The capital defendant's request to waive mitigation, therefore, is more than just an expression of desire, more than a reflection of a psychological state. It is a request, if accepted, that establishes a particular legal state of affairs, one where the penalty-phase process will proceed in a way that it otherwise could not.[71]

To get at the unique character of the Eighth Amendment—and thus, to see why mitigation waiver conflicts with the Eighth Amendment's irrevocable injunction against cruel and unusual punishments—we must briefly investigate how the above account of expressive consent operates with the criminal procedure rights found in the Fourth, Fifth, and Sixth Amendments. We start, of course, with the proposition that waiving rights under the Fourth, Fifth, and Sixth Amendments constitutes an expression of consent that a particular legal state of affairs comes into existence. We shall see that a person's "choice" to waive any of these constitutional rights has a very important function: the consenting act transmutes what would otherwise be an unconstitutional governmental action into a constitutional one.[72]

At work beneath the surface when it comes to consenting to a state of affairs that transmutes an unconstitutional action into a constitutional one are two notions of autonomy, one strong and the other weak. The strong notion rests on the idea that individuals are in the best position to

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transforms the morality of another's conduct . . . is done entirely by a person's mental state and not by her observable behavior."). I do not disagree as a philosophical matter; but in terms of legal analysis, that conceptualization is too confining, as the discussion in this Article shows. I understand the "magic" of consent, for my present purposes, to reside in the enforceability of that consent.

70. *See* J. L. AUSTIN, HOW TO DO THINGS WITH WORDS 98–109 (J. O. Urmson & M. Sbisà eds., 2d ed. 1962); John R. Searle, *How Performatives Work*, 58 TENN. L. REV. 371, 371–72 (1991). I use the notion of speech act merely to refer to the idea that enforceable consent performs the function of bringing about a particular state of affairs. *See generally* JOHN R. SEARLE, EXPRESSION AND MEANING: STUDIES IN THEORY OF SPEECH ACTS 1–20 (1979).

71. *See* Lockett v. Ohio, 438 U.S. 586, 604–05 (1978) (plurality) (state may not preclude jury from considering mitigation).

72. My concern here is not the varying prerequisites to finding a valid waiver of a constitutional right, but in the empowerment of the suspect or criminal defendant to insist upon a waiver. There is no doubt that "[w]hat suffices for waiver depends on the nature of the right at issue." New York v. Hill, 528 U.S. 110, 114 (2000).

determine their own interests. On this understanding, people consent (read: choose to waive rights) because they rationally calculate the costs and benefits of doing so, or at least are presumed to be in the superior position to make that calculation.[73] Consider as a simple illustration the consent to open your luggage for a quick search. That decision presumably rests on the calculation that the intrusion is less onerous than objecting to the search and consequently delaying or even losing the benefits of travel.[74] Most of us consent often in this fashion, deeming it in our best interest.

But this best-interest model can hardly withstand the rough-and-tumble world of real-life law enforcement. The forces brought to bear on individuals to "consent," to forego constitutional rights, are often overwhelming. Detectives everywhere struggle daily to extract consent from suspects, consent to question without a lawyer present, consent to search, consent to appear at the local precinct to stand in a lineup, consent to have a statement recorded on audio or videotape. Prosecutors negotiate hard with defense lawyers—sometimes using outright coercion—to extract consent to adjudicate guilt without the efforts and expense of convening a jury and bringing in witnesses and doing all the other gladiatorial things that go with the courtroom warfare we call a trial. Threats of granting and withholding consent are everywhere in this world. And the coercion tends to be most intense when the granting of consent is manifestly *not* in the best interest of the person giving it.

When allowing pressure to induce consent (encouraging it even), the criminal justice system opts for a weak vision of autonomy, where only first-order preferences are what matters. Inducing waivers means a weakened understanding of autonomy because law enforcement officers induce waivers not by increasing a suspect's ability to choose wisely, but by doing exactly the opposite. Effective law enforcement pressure, often using sophisticated psychologically coercive methods, is calculated to sever first-order preferences from second-order preferences, which by any account of autonomy is a diminution of it. To the extent we endorse that sort of law enforcement technique—and we do, maybe rightly so—constitutional waiver law necessarily endorses this diminution of autonomy. So, the enemy of autonomy—applications of pressure to induce consent—is the prevailing practice in bringing about constitutional waivers, and yet, all the while we honor waivers as exemplifying autonomy's expression.

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73. *See, e.g.*, Ashcraft v. Tennessee, 322 U.S. 143, 161 (1944) ("'Voluntary confessions' in criminal law are the product of calculations . . . [based on] a belief that further denial is useless and perhaps prejudicial.").

74. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 228 (1973) (stating that "a search pursuant to consent may result in considerably less inconvenience for the subject of the search").

How extensive the "waiver" doctrine is vis-à-vis a particular constitutional right tells us nothing about our notions of autonomy, but it speaks directly to how favorably we regard the right at issue. There is no need to apprise a Greyhound Bus passenger of his right to refuse consent to a search,[75] but law enforcement must tell that same passenger, once in custody and before securing his consent to be questioned, that he has the right to remain silent and to summon the aid of a lawyer. We can take from that disparity in the rules of waiver a constitutional declaration about the relative value we place on the Fourth and Fifth Amendment's protections. Detectives may resort to trickery, deception, and other pressure to induce a suspect to talk,[76] which is to say, extract his consent, but the criminal justice system can do nothing to persuade a defendant to forego representation by counsel—to wit, consenting to an adjudicatory process without representation.[77] We can take from that disparity in the waiver rules that police interrogation involves constitutional rights less precious than the rights associated with the need for counsel during a trial proceeding. In short, the rules governing when a "waiver" is valid vary considerably, and that variation is rooted in a judgment about how we regard the right that is at issue. Which means: waiver is not a window to understanding our vision of autonomy; it is a flexible device to regulate the scope of constitutional rights.[78]

The concept of waiver regulates the scope of constitutional rights by injecting a balancing of interests into the constitutional mix. Look again at the notion of waiver when applied, say, to the Fourth Amendment context. A motorist is pulled over ostensibly for a broken taillight. The officer approaches and suspects, though he cannot articulate exactly why, that there is contraband in the car—drugs or guns. The officer asks for license and registration. He then asks if he can search the car while his partner stands a short distance away, gun at the ready. The motorist, anxious to continue on his journey but otherwise uncoerced, consents to the search. We structured this scenario above as one involving a waiver: the officer's search of the car would have been an illegal invasion of privacy under the Fourth Amendment if not for the motorist's *waiver* of his rights thereunder. That waiver converted an illegal search into a legal

75. United States v. Drayton, 536 U.S. 194, 207 (2002).

76. *See* William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 763 (1989). *See generally* Donald A. Dripps, *Foreword: Against Police Interrogation—And the Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699 (1988); Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies By the Police*, 76 OR. L. REV. 775 (1997); Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581 (1979); Daniel W. Sasaki, Note, *Guarding the Guardians: Police Trickery and Confessions*, 40 STAN. L. REV. 1593 (1988).

77. *See* Johnson v. Zerbst, 304 U.S. 458, 465 (1938) (trial judge has "serious and weighty responsibility" to protect against improvident waiver of counsel).

78. *See generally* George E. Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 TEX. L. REV. 193 (1977).

one. But packaging this scenario in terms of waiver is an analytical choice, not a mandated methodology. If a judge wants to extend the notion of waiver into a context far different than this situation, it would serve her purposes to analyze the Fourth Amendment issue here as involving waiver. But a different analytical choice could be made. The motorist's consent could be understood not as a *waiver* of a constitutional right, but as a voluntary act that must be thrown into the analytical mix to determine whether the Fourth Amendment has been violated at all. Consent here need not be understood as a waiver; it may be one thing we consider in judging the scope of the Fourth Amendment protection. By sanctioning the search on the strength of the consent, a court could be understood as holding that the consent helped render the search not unreasonable. And since only unreasonable searches are prohibited, the consent rendered what otherwise would have been an illegitimate search into a legitimate one.[79]

Either analytical model gets the same result, though there are implications for other constitutional matters that arise from car stops. For example, the latter model avoids the thorny question that arises when the waiver model is used: shouldn't the motorist be informed of her rights *before* she is forced to choose between allowing or disallowing the search? If a *valid* waiver means being informed of one's options, then the answer would seem to be, yes, the motorist should be so informed. But the law holds otherwise, and perhaps for good reason.[80] Under a scope-of-rights model, the analysis bypasses the waiver question. The inquiry becomes not whether the consent amounts to a valid waiver, but rather, whether consent was adequate to make the search not unreasonable. To say there has been a "waiver" of constitutional rights, though true, is to say nothing substantive; it only expresses a conclusion, an epiphenomenal fact arising from the legal effect of the expression of consent.

We can explore this idea with another core criminal procedure right—the right to remain silent in the face of governmental interrogation. The conventional locution is to say that a confession amounts to a *waiver* of the right to remain silent. But it need not be packaged as a waiver at all. A right to silence is, more precisely, a right not to be forced to speak. It is a right against governmental power and authority, just as a right to privacy under the Fourth Amendment is a right against governmental power and authority to force a person to involuntarily subject herself to an invasive search. Consent here operates in exactly the same way as in the Fourth Amendment context. Consent

79. This analytical shift is exactly how the Supreme Court has handled third-party consent issues. *See* Illinois v. Rodriguez, 497 U.S. 177, 182–89 (1990).

80. Schneckloth v. Bustamonte, 412 U.S. 218, 243 (1973).

to speak means speaking without unreasonable coercion. It thus means, for analytical purposes, that there has been no constitutional violation, since the violation hinges on the impermissible compulsion to speak. Consent is the key event for determining the scope of the right, which means consent need not be understood as a species of waiver, but as an aspect of the substantive right itself.

To sum up the point: We happen to have a law-enforcement system where the right to remain silent requires a suspect be told of that prerogative, whereas a motorist is not entitled to information about the right to withhold consent. We have a system where trial rights are more difficult to waive inasmuch as there are more procedural hoops to jump through before a waiver will be accepted. These procedural differences reflect not some variable notion of autonomy or a shifting stance on waiver, but a difference in our understanding of the rights involved—the relative value and strength of those rights.[81]

To see these situations as waiver is to invite the notion that a person's consent amounts to permission to have one's rights violated, that a person is consenting not to have the government protect his rights against the sorts of breaches of his autonomy and dignity that the Constitution guaranties. To see these situations as waivers in that sense is to imply that a person may consent to actions that are unconstitutional. The analytical value in the mitigation-waiver context is clear: a capital defendant's waiver to actions that are unconstitutional is perfectly fine here, as well. We are just importing a well-recognized, robust vision of waiver from these other constitutional contexts to another. But to see these situations as scope-of-rights scenarios, we see that consent works differently. There is no breach of autonomy and human dignity when consent authorizes a search, or when consent authorizes detectives to record a confession, because there has been no consent to have one's rights violated. The speech act of consent establishes, by "moral magic," that there has been no violation in the first place. Can this be true of consent in the Eighth Amendment realm as well?

C. Consent and the Uniqueness of the Cruel-and-Unusual-Punishments Clause

The discussion in Part II.B allows us to reframe the issue in a way that gets us out of the Autonomy-Reliability cul-de-sac. If consent to forego a mitigation presentation is something capital defendants have a right to insist upon, then we can speak of the mitigation waiver as a "veto power," a grant of power to the capital defendant to bar the jury from considering that which it would otherwise be required to consider as a

81. *See* Dix, *supra* note 78, at 216–19.

constitutional matter.[82] The consent is not the defendant saying, *you may proceed to adjudicate my death worthiness without adducing mitigation evidence and I will not be later heard to complain*; rather, the defendant is saying, *you* must *establish a state of affairs where the jury is barred from considering mitigation evidence that otherwise must be considered during this penalty-phase proceeding.* A mitigation waiver, in short, is no mere waiver of a claim; it is the establishment of a particular, legally enforceable state of affairs.

The issue, then, is whether this latter state of affairs is itself permissible. Framing the issue in this more precise way pinpoints a key flaw in the pro-waiver analysis that we identified earlier. That analysis focuses exclusively on the internal mental state of the defendant and deems that worthy of respect because otherwise we disrespect his autonomy. It treats waiver as a form of subjective consent, with the judiciary concerned only with the freedom and capacity to form that subjective state of mind.[83] It ignores the allocation of power that occurs when allowing a capital defendant to waive mitigation, the granting of institutional authority to insist upon a particular legal state of affairs that otherwise is constitutionally unacceptable. It suppresses the real doctrinal question: is it legitimate to allocate that institutional authority, that power, to the capital defendant?

If consent transforms what would otherwise be unconstitutional into governmental activity that is constitutional, then we might well ask whether a capital defendant ought to have the power to elevate what would otherwise be cruel-and-unusual punishment into that which is not cruel and unusual. To see why that is the real question here, and to address it, we must delve into some of the conceptual intricacies of the Eighth Amendment.

1. Eligibility and Worthiness for Death

The Eighth Amendment's cruel-and-unusual-punishments clause restricts the manner in which, and to what degree, the state may punish. It is also a procedural provision, akin to the due process clause, a provision that has spawned a complex labyrinth—a puzzling maze, really, that rivals the tax code—of procedural safeguards and rights.[84] The most notable procedural innovation, established to adjudicate who shall live and who shall die, is the two-phase adjudication system that we have had for nearly three decades, the separate guilt and penalty phases.

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82. *See supra* note 1.

83. *See* Godinez v. Moran, 509 U.S. 398, 401–02 (1993).

84. *See* Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1148–55 (1980); Carol Steiker & Jordan Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 357–59 (1995).

Constraining discretion is one constitutional imperative to legitimating executions,[85] but by no means the only one, or even the most important. One response to this constitutional imperative is to eliminate discretion altogether and mandate the death penalty for certain specified crimes. But that solution to the arbitrariness problem contains a crucial flaw, one that is vital to understand in analyzing the mitigation-waiver conundrum. In *Woodson v. North Carolina*[86] and *Roberts v. Louisiana*,[87] the Court struck down mandatory-death statutes because they disallowed "particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death."[88] *Woodson* and *Roberts* gave birth not to the understanding of *individualized consideration* before a death sentence may be imposed, but to the constitutional stature of that understanding.

With a steep fall into the abyss of arbitrariness on the one side, and the hovering granite of jury discretion on the other, the path for capital-punishment jurisprudence to traverse has indeed been narrow and treacherous. But the decision to travel that path speaks to the immense importance of our commitment that human beings faced with state-sanctioned killing not be treated as part of an undifferentiated mass, that instead they be considered as persons with inner lives and with life stories replete with successes and failures, loves and losses, opportunities and obstacles. The capital defendant must be seen as a *person* before the jury confronts the crucial question whether, given who he is and what he has done, his *eligibility* for the death penalty means that he is also *worthy* of it.

There are, then, two findings in any death-sentencing verdict. There is the finding that the defendant has committed a crime that makes him *eligible* for the death penalty. That entails some finding that the killing was "aggravated" in some statutorily defined way.[89] And then there is the finding that the defendant is worthy of the death penalty.[90] *Woodson* and *Roberts* spotlight *Gregg*'s meaning: the death penalty *is* a cruel and unusual form of punishment, unless and until certain procedural safeguards are in place and enforced that compel a jury to determine not just death eligibility, but death worthiness as well.

For our purposes the death eligibility and death worthiness

85. *See* Gregg v. Georgia, 428 U.S. 153, 188–95 (1976).

86. 428 U.S. 280 (1976).

87. 428 U.S. 325 (1976).

88. *Woodson*, 428 U.S. at 303.

89. *See* Tuilaepa v. California, 512 U.S. 967, 971–72 (1994).

90. *See id.* at 972 (worthiness consideration is "where the sentencer determines whether a defendant eligible for the death penalty should in fact receive that sentence"); Buchanan v. Angelone, 522 U.S. 269, 275–76 (1998) (noting sharp demarcation between eligibility and worthiness for death in context of evaluating jury charge).

distinction is the most significant Eighth Amendment development. It carries with it two ideas that we will focus upon in our inquiry about autonomy and the notion of waiver in the capital-sentencing phase. There is the sense of worthiness translated as individual responsibility, so crucial to the retributive underpinnings of capital punishment[91]: the killer is personally responsible as an autonomous being for his crime and thus deserves death. This is worthiness for death as an expression of individual guilt, and talk of individual guilt is within the discursive comfort zone of standard theorizing in criminal-law jurisprudence. But there is another sense of worthiness that I discuss in Part III, *infra*, one that is more subtle, tacit, subversive. Worthiness for death also implies entitlement of the community to judge, to announce that we, the jury, the conscience of the community, can pronounce you, the other, no longer worthy of life. This entitlement derives, in part, from the fact that the court has given the jury "guidance regarding the factors about the crime and the defendant that the state, representing organized society, deems particularly relevant to the sentencing decision."[92] The underside of this purported entitlement is the destabilizing proposition that mitigation evidence may be compelling enough that jurors will feel unentitled to pass judgment on the defendant; that his particular life story, one of privations and abuse so appalling that in some fundamental and morally compelling way, the community—we might well say, society and the world at large—has failed *this individual*, and that failure has stripped the community of the entitlement to punish with death.[93] This is death worthiness that contains within it the destabilizing notion of collective responsibility and guilt. This is death worthiness that does not merely call into question the notion of autonomy as a coherent justificatory idea. Far from it: it takes the notion of autonomy seriously, perhaps more seriously

91. Although the Supreme Court has never expressly constitutionalized retribution under the Eighth Amendment, I believe it is the paramount theory undergirding the constitutional legitimation of capital punishment, insofar as retribution as a punishment theory is rooted in Kantian notions of respect for persons. *See* Ford v. Wainwright, 477 U.S. 399, 406 (1986) (White, J., dissenting) (the Eighth Amendment's central concern is "fundamental human dignity"); Spaziano v. Florida, 468 U.S. 447, 461–62 (1984) (retribution key justification for capital punishment). Personal culpability, not deterrence, repeatedly surfaces as the most important consideration in capital decisionmaking. *See* Booth v. Maryland, 482 U.S. 496, 502 (1987); Tison v. Arizona, 481 U.S. 137, 149 (1987); Enmund v. Florida, 458 U.S. 782, 798–801 (1982).

92. Gregg v. Georgia, 428 U.S. 153, 192 (1976).

93. I emphasize the community aspect of the death-sentencing decision because that is how capital punishment is actually experienced—as a community response to crime, not as a governmental response. *See* FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT 98–99 (2003) (capital punishment is now more often viewed "as expressions of the will of the community rather than the power of a distant and alien government"). In fact, one might understand the preference for jury decisionmaking in capital cases not because juries can do better than judges, but because juries are independent of the state, consciences of a community that has been directly affected by the crime. *See also* Schiro v. Summerlin, 542 U.S. 348, 355 (2004) (identifying the jury's greater independence from the state than that of judges as important to Constitution's framers).

than anywhere else in criminal law—a remarkable fact, given how much lip-service and homage is paid to it in criminal-law theorizing and adjudication. We must keep this understanding of death worthiness fixed in our minds as we now proceed to reframe how the mitigation-waiver conundrum should be analyzed.

2. Reframing the Analysis

Recall our earlier discussion of *Ashworth*, the case that implicitly asks a fundamental question: Why isn't the sovereign's obligation to ensure reliable capital sentencing vindicated by ensuring a reliable death eligibility determination and by according the defendant a full and unimpeded opportunity to present virtually any evidence he wants to show that death eligibility ought not lead to a conclusion of death worthiness? Once a defendant has been found death eligible, the *Ashworth* reasoning goes, the sovereign's distinct interest in capital sentencing reliability has been satisfied. The question of death worthiness is not something that the sovereign has a distinct interest in; its interest is only in ensuring that the defendant possesses the full panoply of rights that permit him to litigate that question.

What *Ashworth* brings to the fore is one of the crucial autonomy questions we must confront: can the Eighth Amendment's procedural requirements be waived? That question is easily glossed over because the *Ashworth* line of argument exploits what we take for granted—namely, that procedural rights and safeguards are, by and large, entirely waivable. But we take waiver for granted in the Eighth Amendment context because we forget that the cruel-and-unusual-punishments injunction embraces both death eligibility and death worthiness. We forget that it is not just routine procedural rights that are being waived here, but procedural requirements that are integral to elevating the death penalty out of the realm of being cruel-and- unusual punishment. We forget, in other words, that the death penalty *is* cruel and unusual absent these procedural requirements geared towards reliable death-worthiness determinations. So, when we ask, *can the Eighth Amendment's procedural requirements be waived?*, we are in fact asking whether a defendant may consent to a cruel-and-unusual punishment.

We can start with an easy proposition, that as a matter of intuition the state's obligation not to inflict inhumane punishment—notably, torture—ought to be irrevocable and thus not subject to waiver.[94] It was, after all, the revulsion against torture that animated the early Eighth

94. *See, e.g.*, Steven A. Blum, *Public Executions: Understanding the "Cruel and Unusual Punishments" Clause*, 19 HASTINGS CONST. L.Q. 413, 451 (1992); Jeffrey L. Kirchmeier, *Let's Make a Deal: Waiving the Eighth Amendment by Selecting a Cruel and Unusual Punishment*, 32 CONN. L. REV. 615, 642–52 (2000).

Amendment decisions.[95] We saw in our earlier discussion that consenting to governmental action that elevates it out of the realm of the unconstitutional is encouraged because, at the least, such consent does not diminish us as a society. But when it comes to inflicting torture or some other barbaric or unusual punishment, this is not so. When someone is tortured, we are diminished as a people precisely because our self-identity is bound up with how the state punishes.[96] A person's consent does not erase our diminishment.[97]

At the very least, it would seem, society itself has a distinct and heightened interest in the enforcement of the cruel-and-unusual-punishments clause, separate and apart from a defendant's particular feelings about it.[98] But does that distinct and heightened interest in enforcing the injunction against cruel and unusual punishment necessarily mean that defendants cannot waive *procedural rights* arising from that clause? After all, there is nothing remarkable in saying that society has an interest in enforcing a constitutional right. Presumably, society has an interest in enforcing *all* the rights in the Bill of Rights, particularly those that seem to us central in maintaining a society of ordered liberty. And yet, as we have discussed earlier, waivers of procedural constitutional rights have flourished, and they continue to flourish. How, then, can we say that a capital defendant may not waive *procedural rights* arising from the cruel and unusual punishments clause?

3. *Why are the Procedural Rights of the Eighth Amendment Different, for Waiver Purposes, Than Other Procedural Rights?*

"Waiver" in the Eighth Amendment context, we now see, differs from "waiver" in other contexts because the enforcement interest in the Eighth Amendment context depends not at all on the individual's choice

95. *See In re* Kemmler, 136 U.S. 436, 447 (1890); Wilkerson v. Utah, 99 U.S. 130, 135–36 (1878).

96. In *Trop v. Dulles*, a case striking down denationalization as cruel and unusual punishment for a conviction of desertion during war, the Court said: "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." 356 U.S. 86, 100 (1958). While citizens delegate to the sovereign the monopoly power to punish, the dignity of each citizen as a human being limits that delegation of power: "While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards." *Id.* And civilized standards are "evolving standards of decency that mark the progress of a maturing society." *Id.* at 101.

97. Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384, 399 (1985) (regarding consent to degrading treatment, "it is immoral to participate in such consensual transactions and immoral for the community to tolerate them"); *see also* DAN-COHEN, *supra* note 52, at 161–63.

98. *See Trop*, 356 U.S. at 101 ("evolving standards of decency that mark the progress of a maturing society"—a test that expressly calls upon society to address its own moral commitments and trajectory); Blum, *supra* note 94, at 449 ("Eighth Amendment decisions revolve not around the punished but around the punisher."); *see also* Biddle v. Perovich, 274 U.S. 480, 486 (1927) (Holmes, J.) ("Just as the original punishment would be imposed without regard to the prisoner's consent and in the teeth of his will, whether he liked it or not, the public welfare, not his consent, determines what shall be done.").

to trigger enforcement of the right; society has the primary interest in enforcing the Eighth Amendment's injunction against illegitimate forms of punishment. The notion that constitutional rights exist to protect the innocent and that the guilty invoke them as proxies for the law abiding simply has no place in Eighth Amendment jurisprudence.[99] Enforcement of the Eighth Amendment is not about protecting the innocent or the guilty; if anything, enforcement in this context, as opposed to the *availability* of enforcement of a constitutional guarantee upon the triggering of the right, is itself the mandate. The obligatory act of universal, irrevocable enforcement of the cruel and unusual punishments clause derives from our irrevocable commitment to protect the essential moral integrity of society at large. In a nutshell, the moral integrity of society depends on the actual enforcement of the Eighth Amendment; by contrast, that integrity is vindicated in other constitutional contexts by the mere *willingness* to enforce a constitutional right.[100] Understood that way, we see that the Eighth Amendment is not an individual entitlement provision, but society's own self-observed and self-enforcing limitation on governmental action that is independent of the defendant's interest in enjoying whatever entitlement the provision grants him. Entitlement suggests a private benefit, and its worth is one that an individual is capable of evaluating. But the protections of the cruel-and-unusual-punishments clause is not a private benefit and we do not allocate authority to individuals to evaluate the worth of those protections.[101] And so it would seem that no individual ought to have the power to elevate an

99. For a discussion of this proxy theory, see Stuntz, *supra* note 76, AT 769–86; Akhil Reed Amar, *The Future of Constitutional Criminal Procedure*, 33 AM. CRIM. L. REV. 1123, 1133 (1996) ("The Constitution seeks to protect the innocent. The guilty, in general, receive procedural protection only as an incidental and unavoidable byproduct of protecting the innocent . . . .").

100. Seeing the Fourth Amendment scenario outside of a waiver context allows us to see why the nature of the rights protected by the Eighth Amendment is unique. Whereas consent to search implicates the scope of the right, not a waiver of the right, consent in the Eighth Amendment context does not expand or constrict the scope of the rights thereunder. Consent to search may make a search not unreasonable, but consent to torture does not make that punishment not cruel and unusual. We can put the matter in autonomy/human dignity terms. Consent to search—theoretically speaking, of course—makes the search not an invasion of the sort that would otherwise be regarded as a breach of one's autonomy and human dignity. But consent to torture does not make torture not an assault on autonomy and human dignity. Consent to torture amounts to consent to having one's dignity violated, which is a genuine waiver of a right. So the scope-of-rights model does not work with the injunction against torture and other barbaric and unusual forms of punishment.

101. For an attempt to conceptualize criminal procedure through the lens of a market analysis, see generally Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289 (1983). In this framework, we might treat mitigation waiver as a form of "market failure," and thus not worthy of judicial acceptance. On this view, a capital defendant seeking to waive mitigation is a person who has lost the ability to estimate appropriately the value of his own life. Where the risks of "market failure" are high, the availability of waiver must tighten. *See* Stuntz, *supra* note 76, at 771 n.24; Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1131 (1986) (noting that legal interference with private preferences sometimes occurs when a situation mimics that of a "market failure").

unconstitutional punishment into a constitutional one by the mere expression of consent, for the range of acceptable punishments is rooted in a societal benchmark of what we as a people will countenance.

But still the nagging question: what makes the Eighth Amendment's procedural rights different from other procedural rights? It is one thing to bar torture even for those who willingly accept it; it is quite another to say a defendant cannot choose to forego a procedural right that society is fully prepared to enforce, if triggered by the defendant's invocation of it. It is the *Ashworth* question again: Why isn't the sovereign's distinct obligations to uphold the mandates of the Eighth Amendment satisfied by a court's open willingness to enforce the procedural rights?

The answer must be that when a capital defendant consents to a penalty-phase proceeding that effectively strips from the jury the ability to evaluate death worthiness, and not just death eligibility, that defendant cannot be understood to be converting what would otherwise be illegal into something that is now legal. A consenting motorist does that; a consenting interrogation suspect does that; a capital defendant does not. Quite the opposite, in fact. It is crucial to have fixed in our minds that *Furman v. Georgia*[102] is still good law: the death penalty *is* cruel and unusual punishment. *Gregg* did not overrule *Furman*. The story of capital punishment from *Furman* to *Gregg* and its progeny is not a story of executions being deemed cruel and unusual in one moment and then not cruel and unusual a short while later. The story is one of resurrection: *Gregg* resurrected capital punishment by constructing the Eighth Amendment into an elaborate procedural edifice. A form of punishment, in short, was elevated above the realm of the cruel and unusual by the procedural requirements attendant to its infliction.

So, we can now frame our issue in this way: the defendant who seeks to waive mitigation is, in effect, saying that he waives the right to the protections spawned by *Gregg* and mandated by *Roberts* and *Woodson*. The defendant's waiver of mitigation is consent to forego the opportunity to try to convince the jury that he is not death worthy. The waiver is an expression of consent to getting the death penalty solely upon the jury's finding that he is death eligible. To say that the state must validate this consent is to allocate to the mitigation-waiving defendant the power to insist upon a process that would otherwise violate our commitment to eschew any punishment that is cruel and unusual. The point is that when a capital defendant consents to bypassing those procedural rights, he is not elevating what would otherwise be illegal to being legal; he is stripping the process of the very processes that exist to render the death penalty not cruel and unusual.[103] It would be analogous to a criminal

102. 408 U.S. 238 (1972).

103. *See* Commonwealth v. McKenna, 383 A.2d 174, 181 (Pa. 1978) ("The waiver rule cannot be

defendant consenting to have a jury trial consisting of twelve dogs and cats. That act of consent would not elevate such an absurdity to an acceptable adjudicatory procedure precisely because a jury of competent and fair-minded adults is internal to the very idea of a *jury trial.* Consent in both instances does not preserve autonomy and dignity; it authorizes the trampling of it. A mitigation waiver, in sum, is a genuine consent to unconstitutional treatment, one that we do not see in the Fourth and Fifth Amendment contexts.

Does what we have discussed so far extend to the Sixth Amendment right to counsel, a basic trial right? This is an important consideration, since here we approach an area that overlaps with the mitigation-waiver situation. After all, capital defendants could invoke *Faretta* and represent themselves, thus accomplishing the mitigation waiver by choosing, in their capacity as lawyer, not to present any mitigation evidence.[104] When a defendant chooses to represent himself, the conventional locution is to say that he is waiving his right to counsel. But actually the right to counsel is the constitutional prerogative not to be *forced to represent yourself.*[105] The right to counsel is thus akin to the Fourth Amendment right not to be forced to expose one's privacy in the face of governmental power and authority, and akin to the Fifth Amendment right not to be forced to speak against oneself. These are all immunity rights *vis a vis* the government.[106]

Properly framed, under *Faretta* a defendant's right to counsel has not been violated because he has not been forced to represent himself. So consenting to represent oneself need not be understood strictly as a waiver of counsel. The consent means there has been no violation of the right to counsel, no forcing of self-representation as there was in *Gideon.* Whereas consent to self-representation speaks directly to the parameters

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exalted to a position so lofty as to require this Court to blind itself to the real issue—the propriety of allowing the state to conduct an illegal execution of a citizen.").

104. *See* Godinez v. Moran, 509 U.S. 398, 399–400 (1993); United States v. Davis, 285 F.3d 378, 385 (5th Cir. 2002).

105. Gideon v. Wainwright, 372 U.S. 335 (1963).

106. There is, of course, the distinction between "trial rights"—those rights that enhance the truth-finding process (they include the right to counsel)—and rights associated with field-encounters with law enforcement (notably, our Fourth Amendment rights). That distinction, in the end, speaks to the level of awareness we demand of waiving parties before we permit them to forego those rights. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 237 (1973). "Trial rights" impose upon the state the obligation to ensure an adequate level of awareness (*see, e.g.*, Boykin v. Alabama, 395 U.S. 238, 242–44 (1969); Johnson v. Zerbst, 304 U.S. 458 (1938)), an obligation that the *Bustamonte* Court held did not exist with respect to waivers of the Fourth Amendment. *Bustamonte*, 412 U.S. at 237. As noted in the text, *Miranda v. Arizona* is not an adequate-awareness case, but a coercive-influence case. 384 U.S. 436, 445–48 (1966). The adequate-awareness obligation associated with trial rights reflects not so much a solicitude for autonomy, but an obligation to ensure a fair trial. *Bustamonte*, 412 U.S. at 242. Solicitude for autonomy is epiphenomenal to the primary goal of preserving the integrity of the trial process. *Cf.* Singer v. United States, 380 U.S. 24, 36–38 (1965) (stating that the defendant has no right to insist upon a non-jury trial).

of the right to counsel—namely, that one cannot be *forced to have counsel*—consent to bypass the procedural requirements of the Eighth Amendment speaks only to the defendant's purported right to have the jury sentence him to death in a way that is cruel and unusual under bedrock constitutional principles.

We can now globalize the distinction. The underlying procedural rights of the Eighth Amendment enforce the requirement that the jury decide the sentence after receiving and considering the necessary information to arrive at a morally reasoned judgment. They are not rights that incorporate consent to determine the scope of the rights. By contrast, the scope of the rights arising from the Fourth, Fifth, and Sixth Amendments incorporates consent: consent to search means no unreasonable search; consent to speak means no involuntary self-incrimination; consent to representation by counsel means no forced self-representation. Because consent to bypass a mitigation presentation does not vindicate the right to legitimate capital sentencing, because it dramatically sabotages it, consent does not function in the Eighth Amendment context the way it does in the Fourth, Fifth, and Sixth Amendment contexts. The scope of the rights protected by the Eighth Amendment cannot be defined or shaped by consent; the scope of those rights is defined by societal standards alone, and those rights must therefore be enforced independent of any act by an individual to have the enforcement triggered.

4. The Power to Consent as an Allocation of Power

One virtue of shifting our locution from *waiver* to *consent* is that it reorients our conceptualization of what we consider to be waiver situations as instances where legal relationships are transformed. We shift from seeing the individual relinquishing rights—a conceptualization that encourages intellectual forays into subjective consent and the need to be informed of options—to seeing the individual expressing consent, a form of speech act that grants permission to the state actor to do that which otherwise could not be done to the person consenting. That, in turn, invites us to examine the power to consent as an instance of the state allocating power to the individual citizen. We are, then, dealing with a troubling *ought* question: ought we give to the capital defendant the power to consent to a state of affairs that would render the death penalty cruel and unusual absent that consent?

Those who approach this *ought* question from the Autonomy-Ideal platform—that is, those who insist that respect for individual autonomy requires we not bar competent demands for mitigation waiver—advocate protecting the individual's personal interest to pursue his own freely and

competently chosen ends.[107] But this position merges two different types of interest—one's *actual* interest and one's *antecedent* interest. A capital defendant may well have an *actual interest* in deciding for himself what evidence to present on the question of his punishment. An acute interest, no doubt. We have to admit that there is no *a priori* reason to discount as irrational or utterly absurd the notion that a speedy and painless lethal injection might be preferable to decades existing, if not outright struggling to survive, in the subhuman conditions of an eight-by-twelve cell. Nor can we brush aside the high personal costs associated with fighting for a decade or more as a death-row inmate to have the sentence overturned. Because we cannot overlook these things, there is some force to analogizing the capital defendant's actual interest in vetoing a mitigation presentation to a terminally ill patient's actual interest in foregoing continued medical intervention.

But while all this speaks to the defendant's *actual* interest in free choice, it does not address each person's *antecedent* interest in preserving human dignity, an interest that binds all persons as rational agents.[108] In the capital punishment context, the preservation of human dignity is expressed in mandating a capital-punishment scheme that maximizes the reliability of sentencing outcomes through individualized sentencing, with mitigation evidence presented in an adversarial proceeding.[109] Pro-waiver proponents do not defend what is implicit in their position—namely, that the only interest worth considering is the individual's *actual* interest and that the Eighth Amendment's protection of the defendant's *antecedent* interest in mandating mitigation, which he has by virtue of his membership in society, is not part of the equation.[110] What this analytical lapse reveals is a failure to grapple with the concept of autonomy in favor of the tendency to invoke it for its rhetorical value.

Note further that the "ought" here is not an imperative directed at the capital defendant himself, but at the sovereign. The imperative to

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107. *See* Bonnie, *supra* note 4, at 1375–76.

108. *See* KANT, GROUNDWORK, *supra* note 54, at 103.

109. *See* Lockett v. Ohio, 438 U.S. 586, 602–05 (1978).

110. This distinction between actual and antecedent interest roughly correlates with Kant's distinction between contingent imperatives and categorical imperatives. An individual may feel impelled to pursue a particular end by virtue of her particular contingent situation, but whatever imperative for action that contingent situation might call for does not make it morally right. Only categorical imperatives—those *oughts* that are mandated by non-contingent rationality, *oughts* that derive from the injunction to do that which we are willing to universalize as a law of nature that binds all rational beings—are worthy of being regarded as moral. *See* KANT, GROUNDWORK, *supra* note 54, at 29–30, 98–100. A capital defendant's *actual* interest in waiving mitigation, which pro-waiver proponents seek to protect in the name of autonomy, is in Kant's formulation a contingent interest and thus unworthy of categorical protection. But the antecedent interest that we all share in ensuring the protection of each person's dignity through reliable capital sentencing is more susceptible to satisfying the sort of categorical imperative that Kant has in mind, and therefore would be an interest that is more fully attuned to a robust conception of autonomy. *Id.*

give the jury available mitigation evidence regardless of the defendant's subjective desires is not a direct renunciation of those subjective desires. The *ought* question here is whether the capital defendant's subjective desire to veto mitigation ought to be treated as itself an imperative placed upon the state to forego an essential ingredient to legitimate capital sentencing. There is, then, a collision not between the Autonomy Ideal and the Reliability Ideal, but a collision between two competing imperatives—the imperative deriving from the subjective desires of the capital defendant versus the imperative derived from the constitutional commitment to pursue individualized capital sentencing through the use of mitigation presented in an adversarial sentencing proceeding.[111] We have already considered Eighth Amendment-inspired reasons why the latter imperative trumps the former. Those Eighth Amendment-inspired reasons, we should now observe, derive from the more general principle that the *power of consent* may not be a power to grant authority to another to do that which the other can never claim a moral right to do. Torture is one example of this: we have seen as a matter of intuition that the power of consent does not extend to allowing torture because we cannot independently claim the moral right to torture. Likewise, a woman who is told to submit to sexual intercourse or her baby child will be killed does not consent when she submits, even though she has exercised a "choice," because her power of consent does not extend to allowing another to commit that indignity upon her. The capital defendant who seeks to veto mitigation does not have the power to consent to a proceeding where the jury must decide between life and death without information *essential* to that task because the state can never claim a moral right to impose a sentence of death in the face of a jury decision rendered without a presentation of available mitigation.

More practical considerations confirm what we have thus far explored. Think of what happens in a conventional sentencing situation. A trial judge, acting as sentencer in a non-capital case, must consider after a felony conviction where imprisonment is contemplated information about the offender contained in a presentence investigation report.[112] Waiving a presentence report is not an option: a defendant who faces incarceration does not have the power to consent to a proceeding

111. The Supreme Court's refusal to allocate power to a criminal defendant to insist upon a non-jury trial loosely accords with the suggestion in the text. The Court essentially reasoned that nothing comes of the fact that a defendant may not demand that his waiver of a jury be respected, since "the result is simply that the defendant is subject to an impartial trial by jury—the very thing that the Constitution guarantees him." *Singer*, 380 U.S. at 36. Disallowing a capital defendant to insist on a mitigation-free penalty-phase proceeding results in nothing more than a penalty-phase proceeding that the Eighth Amendment contemplates. To be sure, this reasoning is too glib, as it gives virtual carte blanche to disregard any attempt at a waiver of a constitutional or other procedural right.

112. *See, e.g.*, N.Y. CRIM. P.L. § 390.20(4); FLA. R. CRIM. P. § 3.710; N.J. COURT RULES 3:21-2.

where the presentence investigation is dispensed with.[113] The rationale for this refusal to allocate to the defendant the power to consent in this way is, as one court put it, that "a sentencing Judge should base the sentencing decision on a full understanding of a defendant's past, which includes a current review of factors such as a defendant's family and social history and the results of any physical or psychiatric examinations."[114] The reason that the federal sentencing guidelines treat presentence investigations as "essential"[115] is that a sentencing judge needs "the fullest information possible concerning the defendant's life and characteristics."[116]

If the non-capital defendant does not have the power to bar the presentation of mitigating circumstances in a presentence report—and thus, bar the sentencing judge from considering mitigating circumstances—then, at the very least, some compelling reason must be articulated to justify allocating that veto power to a capital defendant. The reason cannot be that the capital penalty phase has the trappings of a trial proceeding, since that attribute of penalty-phase litigation is just that—a mere attribute. "[D]espite its unique aspects," the Supreme Court has said, "a capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding—a determination of the appropriate punishment to be imposed on an individual."[117] Nor can the reason be that a capital defendant has a greater autonomy interest than a non-capital defendant in controlling his own fate. Nothing distinguishes the weightiness of the autonomy interest between capital and non-capital defendants. If anything, the capital defendant's autonomy interest seems more diminished in the light of the heightened importance placed on individualized sentencing determinations in the capital context.[118] In fact, in *Gregg* itself, the Supreme Court cited the central role of presentence investigation reports in non-capital cases to highlight the importance of ensuring that relevant mitigation is not withheld from the capital sentencer.[119]

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113. *See, e.g.*, People v. Selikoff, 35 N.Y.2d 227, 238 (1974) ("A judge may not ignore those provisions of law designed to assure that an appropriate sentence is imposed."); Harden v. State, 290 So. 2d 551, 551 (Fla. 1974); State v. Richardson, 285 A.2d 231 (N.J. Super. Ct. App. Div. 1971).

114. People v. Kuey, 83 N.Y.2d 278, 282 (1994).

115. UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL § 6A1.1 cmt. background (2005). ("A thorough presentence investigation is essential in determining the facts relevant to sentencing.").

116. Williams v. New York, 337 U.S. 241, 247 (1949).

117. Spaziano v. Florida, 468 U.S. 447, 459 (1984).

118. *See, e.g.*, Lockett v. Ohio, 438 U.S. 586, 604 (1978) (recognizing a "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed").

119. Gregg v. Georgia, 428 U.S. 153, 190 (1976). The Court said:

> If an experienced trial judge, who daily faces the difficult task of imposing sentences, has a vital need for accurate information about a defendant and the crime he committed in order

Intuition, logic, morality, and even constitutional principle, suggest that a sentencing jury in a capital case ought not be forced to consider whether to impose death with *less* information than what a judge must consider before sentencing a defendant to a term of years. Yet that is the inescapable conclusion if a capital defendant is given the sort of veto power mitigation-waiver proponents advocate.

Inescapable as well is the fact that allocating what we can now say is an extraordinary power to a capital defendant undercuts the legitimate functioning of any acceptable capital-sentencing scheme. A mitigation-waiving defendant is accorded the power to impede a sentencing jury from carrying out its function, rendering it a "jury" in name only.[120] That is, the people serving as capital jurors ought not be filtered out of the analysis. A capital jury is more than just an institutional mechanism to carry out the capital decisional process; it consists of people who, called upon by civic obligation to decide between life and death, ought not be victimized by a capital defendant's veto over the presentation of vital information they need to do an extraordinary task—one they will forever live with as an indelible experience. Just as litigants in jury selection may not deprive jurors of their rights,[121] a capital defendant ought not be given the power to do so by withholding information essential to the job of sentencing.

The Autonomy Ideal comes off as anemic when we remove it from abstract considerations of waiver and instead situate the analysis in real-world terms of power-allocation. Abstract fidelity to the Autonomy Ideal papers over the perverse irony that those most likely to have powerful reasons for receiving a non-death sentence are those most at risk of volunteering for execution. It shoves aside the absurd prospect that of all the institutional actors in the juridical drama to decide whether the defendant must die, it is the jury who will remain in the dark about exactly who this defendant is as a human being. Most importantly, it obscures the possibility that juries can never have enough information to decide another's worthiness to live or die. It suggests that society's concerns extend to process alone, that once the judicial system provides a "fair" process, nothing else follows because all else is a matter of

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to be able to impose a rational sentence in the typical criminal case, then accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision.

Id.

120. Muhammad v. State, 782 So. 2d 343, 362 (Fla. 2001) ("failure of [the defendant] to present any evidence in mitigation hinder[s] the jury's ability to fulfill its statutory role in sentencing in any meaningful way" because the sentencing scheme "contemplates a *full adversarial hearing* before the jury with the presentation of evidence of aggravating and mitigating circumstances" (emphasis added)).

121. *See* Batson v. Kentucky, 476 U.S. 79, 87 (1986).

individual sovereignty, not *collective* obligation. It clouds our vision of what a penalty-phase proceeding is really about—the mingling of individual and collective responsibility for crime.[122]

III. MITIGATION AND THE MINGLING OF AUTONOMY AND COLLECTIVE RESPONSIBILITY

So far we have seen that (1) essential to salvaging the death penalty from being a cruel and unusual punishment is the consideration of mitigation evidence, (2) the constitutional guarantee against cruel and unusual punishment differs from other criminal-procedure rights because its enforcement may not depend on the defendant's decision to trigger it, and (3) autonomy as a substantive concept (as opposed to rhetorical slogan) plays little to no role in traditional waiver analysis. These three doctrinal conclusions support the proposition that no individual defendant ought to have the power to veto wholesale a mitigation presentation in a capital penalty-phase proceeding.

But the analysis thus far leaves intact the clash of ideals that produces the mitigation-waiver conundrum—the clash between the Autonomy Ideal and the Reliability Ideal. As suggested earlier, we might transcend that autonomy-reliability dichotomy by disentangling the capital defendant's *actual* interest in waiving mitigation from his *antecedent* interest in ensuring that each capital defendant's dignity is protected by insisting that all capital sentencing be reliable. That antecedent interest, a Kantian analysis suggests, comports with a philosophically coherent conception of autonomy, whereas the more contingent *actual* interest does not.[123] Because the Kantian analysis would treat the capital defendant's decisionmaking that is rooted in the antecedent interest in reliable capital sentencing as a better expression of genuine rational autonomy, the schism between autonomy and reliability becomes a mirage produced by the misguided valorization of the defendant's actual interest in waiving mitigation.[124]

The answer to this Kantian analysis, however, reveals what is truly at

122. In a very loose sense, the privacy-basis for allowing mitigation waivers masks what is vital in the mitigation-waiver debate in a similar way that the privacy-basis for abortion masks what is vital in understanding gender inequality and violence. Feminist scholars rightly point out that women's sexual subordination implicates how we regard the fetus. In a world of true gender equality, where procreation is not tainted by sexual subordination, we would regard the fetus differently—more hospitable to legal protection—than we now do. *See generally* Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991).

123. *See* KANT, GROUNDWORK, *supra* note 54, at 103.

124. This transcendence of the autonomy-reliability dichotomy roughly approximates Kant's transcendence of the subjective-objective dichotomy in moral theorizing. *See id.* at 100. Kant's Categorical Imperative is objective in the sense that it binds all rational agents as such, and it is subjective in that it arises from the will of the individual governed by pure, non-contingent rationality. The will is the lawgiver (subjective), and the law that ensues binds all rational beings (objective). *Id.*

stake in reconceptualizing the mitigation-waiver conundrum. A capital defendant's actual interest in waiving mitigation may not conflict with the antecedent interest in reliable capital sentencing *if* mitigation belongs to the defendant. The notion of reliability in capital sentencing, it could be argued, is predicated on the preservation of a *process* through which the capital-sentencing decisionmaking must take place.[125] That process may comport with the antecedent interest in reliability, even when the capital defendant's actual interest in mitigation waiver is honored, so long as we understand the process to embrace only those things that the sovereign is obliged to respect. If the actual presentation of mitigation is an interest that rightfully only belongs to the defendant—as opposed to the *opportunity* to present mitigation, which is a sovereign obligation under the *Lockett* principle—then the Kantian antecedent-interest analysis has no traction at all.[126]

So, to transcend the autonomy-reliability distinction, we have arrived at a fundamental question, one much talked about but surprisingly unexplored in the capital-punishment literature: *what is mitigation?*

A. THE CONVENTIONAL UNDERSTANDING OF MITIGATION

What exactly is *mitigation*?[127] Better yet, what is its *function*? One

125. With all the talk of "reliability" in death-penalty jurisprudence, it is surprisingly hard to discern exactly what we mean by it. The essence of the problem is that we cannot evaluate neutrally whether a particular jury decision to impose death is right or wrong. And so we have judicial pronouncements about the heightened importance of "reliability" but no definitive statement of how to evaluate any particular outcome as "reliable," other than through an evaluation of the adjudicatory process itself. *See* Jeffrey Abramson, *Death-is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO J. CRIM. L. 117, 140 n.130 (2004); Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 317 (1983). But understanding reliability as a function of process does not really get us anywhere. We are still left with the question, *what sort of process does reliability demand?* Certainly, Eighth Amendment reliability "has something to do with respecting and confronting the humanity of the individual defendant" (Steiker & Steiker, *supra* note 84, at 371), but it may well be that this "something" is merely the granting of the capital defendant the unimpeded opportunity to mount a mitigation case in the penalty phase.

126. In fact, on this view, a Kantian analysis would seemingly demand respect for the capital defendant's expression of his actual interest to waive mitigation as a matter of respecting formal dignity. For the justification of taking from the capital defendant that which belongs to him—this thing we call "mitigation"—would then be based on a judgment that the price is too high to let the capital defendant keep what belongs to him. Kant expressly distinguishes those things which have a "price" and those things that do not. The latter, he argues, are things with "dignity." KANT, GROUNDWORK, *supra* note 54, at 102. Accordingly, disallowing a capital defendant the prerogative to withhold what is his because of the price to be paid in diminished sentencing reliability violates his dignity.

127. The Supreme Court, it is fair to say, has obsessed over the concept of mitigation in capital jurisprudence, but has never defined it. A state may not preclude the jury from considering "*any* aspect of a defendant's character or record and *any* of the circumstances of the offense" that might call for a sentence less than death. Lockett v. Ohio, 438 U.S. 586, 604 (1978) (emphasis added). It is therefore unclear how refined a state may define "mitigation," because the act of defining suggests greater judicial leeway in restricting the admission of evidence proffered by the defense in the penalty phase than the Eighth Amendment may allow. *Compare* Hitchcock v. Dugger, 481 U.S. 393 (1987)

commentator says it is evidence that "situate[s] individual experiences of violence in their broader social context."[128] True enough: a good mitigation presentation does function to put a broader frame around the violent episode that necessitates the penalty-phase proceeding. By recasting the view of the aggravated nature of the crime, mitigation supposedly diminishes (mitigates) the indignation aroused by the horror of what the defendant has done. Look at the standard jury instruction in a capital case and you will see that mitigation is defined in just those functional terms, as any item of evidence that might weigh in favor of a life verdict. Mitigation, it is often mistakenly thought (with deadly consequences), is a counterweight to the horrors of the crime for which the defendant stands convicted.[129] Recall that the aggravating factors associated with the crime render the defendant death eligible, which means he is qualified as a matter of justice—understood retributively as just deserts[130]—for execution. Mitigation, the conventional view holds, softens the iron fist of justice by tempering the application of retributive impulses.

1. Mitigation and Mercy

Few death-penalty observers and practitioners question the conventional view of mitigation's function, that at its core mitigation injects considerations of mercy into the death-sentencing calculus.[131] Because mitigation is conventionally understood as a mercy-inducing device, and because death worthiness is the doctrinal underpinning of mitigation in capital jurisprudence, death worthiness under the

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with Jurek v. Texas, 428 U.S. 262 (1976). Apparently the general rule of evidentiary relevance still operates as an admissibility screen, but what *relevance* means in this context is unclear. *See* Franklin v. Lynaugh, 487 U.S. 164, 172–73 (1988) (suggesting capital defendant may not have constitutional right to a lingering-doubt jury instruction). Indeed, relevance in the mitigation context suffers from circular reasoning: "'Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.'" McKoy v. North Carolina, 494 U.S. 433, 440 (1990) (quoting State v. McKoy, 372 S.E.2d 12, 45 (N.C. 1988) (Exum, C.J., dissenting)). Relevant mitigation, in other words, is what a jury might deem relevant in deciding between life imprisonment or death.

128. Phyllis L. Crocker, *Feminism and Defending Men on Death Row*, 29 ST. MARY'S L.J. 981, 989 (1998).

129. How explicitly a jury instruction pits mitigation against aggravation depends in part on whether the capital statute calls for a weighing of mitigation and aggravation—so-called "weighing" statutes. *See generally* Scott E. Sundby, *The* Lockett *Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147 (1991); Srikanth Srinivasan, Note, *Capital Sentencing Doctrine and the Weighing-Nonweighing Distinction*, 47 STAN. L. REV. 1347 (1995).

130. KANT, GROUNDWORK, *supra* note 54.

131. *See* Abramson, *supra* note 125, at 121 ("At the heart of the Court's early death-is-different jurisprudence was a struggle to define an ideal of moral consistency that nonetheless left room for the exercise of moral mercy."); Anthony V. Alfieri, *Mitigation, Mercy, and Delay: The Moral Politics of Death Penalty Abolitionists*, 31 HARV. C.R.-C.L. L. REV. 325, 327–31 (1996). *See generally* Theodore Eisenberg & Stephen P. Garvey, *The Merciful Capital Juror*, 2 OHIO ST. J. CRIM. L. 165, 175–76 (2004); Goodpaster, *supra* note 125, at 302, 318.

conventional view must be a doctrine about mercy.[132] The conventional understanding of mitigation as a mercy-inducing device explains why it is so often linked to "[v]ictimization theory," the idea being that the capital defendant's own past victimization, stretching back to childhood, ought to provoke mercy.[133]

Unless we question the presupposition of mitigation as a mercy-inducing device, any argument against allowing capital defendants to waive mitigation must defend the claim that considerations of mercy are essential to reliable capital sentencing. Those who elevate the autonomy interests of capital defendants over the jury's need to witness and then consider a mitigation presentation understand well how difficult it is to defend the claim that mercy considerations are essential to the legitimacy of death-penalty decisionmaking. Though mercy may be legitimately considered, they would argue, it is personal to the convicted defendant, and thus *requiring* that the jury consider it over a recalcitrant defendant's objection hardly strikes at the legitimacy of capital punishment.[134]

Pro-waiver advocates, then, seize on the idea of mitigation-as-mercy because understanding mitigation in that way is more hospitable to their "autonomy" premise. It is more hospitable not only because it is questionable to claim that a jury *must* in every capital case consider granting mercy or leniency, a claim that anti-waiver advocates seemingly insist upon; it is more hospitable not simply because the victimization theory that the mitigation-as-mercy notion embraces is unattractive sentimentalism masquerading as moral uprightness, a form of moral kitsch; and it is not more hospitable simply because overriding a defendant's wish not to seek mercy seems a rank form of paternalism.[135]

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132. *See* Abramson, *supra* note 125, at 121 n.17 (2004) (death-worthiness judgment understood as the jury's discretionary act to withhold imposing a death sentence as "a pure act of moral mercy or leniency"); *see also* Caldwell v. Mississippi, 472 U.S. 320, 330–31 (1985) (finding prosecutor's summation that jury's sentencing decision would receive appellate review violated Eighth Amendment because appellate review does not permit considerations of mercy); Gregg v. Georgia, 428 U.S. 153, 199 (1976) (noting that *Furman*'s demand for non-arbitrariness did not foreclose the exercise of mercy in deciding against imposing death).

133. Alfieri, *supra* note 131, at 333.

134. *See* Bonnie, *supra* note 4, at 1383–84. This point is reinforced by the fact that "mercy conflicts with justice." Eisenberg & Garvey, *supra* note 131, at 167. That is why mercy is a problematic virtue, if it is a virtue at all. *See id.* at 167, n. 3 (citing extensive philosophical literature on mercy and its problematic relationship to justice); Samuel Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 Cornell L. Rev. 655, 672 (1989) ("To sympathize smacks of weak and amoral emotionalism at sentencing; its influence remains suspect.").

135. *See generally* Sunstein, *supra* note 101, at 1171 (stating "the troublesome nature of [paternalism]... stems from the fact that the government is claiming to know better than the individual whether a particular course of action will serve that individual's interests"); David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 U. VA. L. REV. 519, 519 (1988) (discussing our culture's distrust of paternalism). The most notable stance against paternalism was, of course, taken by John Stuart Mill, who said that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either

Rather, it is more hospitable primarily because asking for mercy intuitively seems better understood as an individual's prerogative rather than as an evidentiary mandate. Mercy can never be demanded; nor can one feel entitled to it. It is "a gift, an act of grace, which the mercy-giver is free to extend or withhold as he or she sees fit."[136] And on top of that, since mercy conflicts with justice, it is questionable as a virtue. It is thus difficult to understand why a capital defendant *must* abide a mercy presentation that positively defies his wishes that the jury not consider reasons for exercising mercy.

While seeking mercy seems to be a personal prerogative, and thus waivable, the pursuit of dispassionate justice, a retributive justice that is at the heart of capital punishment, is unquestionably the sovereign's obligation, a systemic mandate. Furthermore, the criminal law rightly demurs when it comes to a wide-ranging inquiry into the character of the defendant. The criminal law focuses on the deed, and from the deed adjudicates culpability, and from culpability draws some conclusions about character. What the criminal law does not do is demand that the conclusions about character be drawn from all possible sources; for if it did, there would be legitimate howls of protest against the overreaching of government. And because the criminal law confines the inquiry to the criminal deed, it is reasonable to argue that considerations beyond the criminal deed from which conclusions about character might be drawn are matters that individual defendants themselves must introduce.[137] And if that is so, then it is reasonable to insist that the state may not compel such considerations over an individual defendant's wishes.

2. Demonic Agency and the Task of Humanizing the Defendant

This division of duties—the state focuses on the criminal deed, the capital defendant on reasons for extending mercy or leniency—encapsulates the conventional view of how capital cases ought to be tried. Prosecutors urge juries to assess a capital defendant's worthiness to receive the death penalty by exploiting what one commentator calls "the myth of demonic agency."[138] Demonic agency is the key rhetorical imagery in the prosecutor's arsenal because it captures the interlocking nature of autonomy and punishment. At the conceptual level, the skeletal line of thought would go like this: autonomy is valued because,

physical or moral, is not a sufficient warrant." JOHN STUART MILL, ON LIBERTY 9 (Hackett 1978) (1859).

136. Eisenberg & Garvey, *supra* note 131, at 168.

137. The idea of the crime reflecting or bespeaking the perpetrator's character stretches back to Aristotle's argument that one's character is, in a deep sense, chosen. *See* ARISTOTLE, NICHOMACHEAN ETHICS, book III, ch. 5.

138. Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 547 (1995) [hereinafter Haney, *Social Context*]; *see also* Pillsbury, *supra* note 134, at 692 (using the term, "the mythic role of Monster" to capture the same idea as the "the myth of demonic agency").

as Mill would say, choice is valued for its own sake. Choice is an independent good. And it is an independent good because choice is integral to personhood. Choice, in turn, when understood as a manifestation of our free will, is key to our understanding of responsibility, inasmuch as choice allows for assignations of responsibility. We need only think of extreme cases of coercion or other so-called involuntary acts to see the truth in the proposition that the criminal law assigns criminal responsibility based upon the moral significance assigned to the act of choosing. "The settled moral understanding is that what you deserve is a function of what you choose."[139]

Fostered by the media and by public discourse generally, exploited by capital prosecutors in virtually every capital prosecution, and embedded in the belief in free will and autonomy, the idea of demonic agency trumpets the capital defendant as an autonomous agent, disconnected from the collective experience of the community, an autonomous agent who has chosen to express his evil character through violence.[140] Demonic agency conveys that the perpetrator has no personal history worthy of taking seriously, no authentic human relationships, no existence within a social context[141]—nothing that gives the demonic agent a human dimension beyond the media-driven caricature of evildoers; no human dimension other than as the term itself suggests: an autonomous "self" that serves as the repository for evil choosing. The notion permits the sentencer to adopt a stance of indifference towards the actual person who sits at the defense table. That indifference marks the rupture of human kinship; and that rupture dissipates questions about the efficacy and morality of the death penalty.[142]

The notion of demonic agency flourishes in capital jurisprudence even though "[u]nderstanding how free will is possible is perhaps the most vexing of the traditional problems of philosophy."[143] It flourishes nonetheless because it is useful to prosecutors and congenial to jury decisionmaking. It is useful and congenial because it propagates a false

139. Sanford Kadish, *The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679, 690 (1994). It is, to me, not at all clear that we arrived at our system of punishment by a preexisting valuing of the Autonomy Ideal. What remains unclear is whether this is, in fact, a *post hoc* rationalization for our penal system. Did we consciously arrive at our system of punishment, including capital punishment, based on the Autonomy Ideal? Or did we inherit this mode of responding to crime and then work backwards to construct this intellectual edifice, and in so doing realize that we need to adhere to the Autonomy Ideal? Is the Autonomy Ideal, in short, a product of our punishment system rather than a key ingredient in the creation of it?

140. Haney, *supra* note 138, at 550.

141. *Id.*

142. Pillsbury, *supra* note 134, at 692 n.117 (noting the importance of indifference over mere hatred in capital sentencing).

143. Timothy O'Connor, *Introduction* to AGENTS, CAUSES, AND EVENTS 3 (Timothy O'Connor ed., 1995).

clarity about the capital defendant as an embodiment of evil and nothing more. It usefully blends an internal contradiction: *demonic* suggests inhumanity, the existence within the defendant of an evil force, a profound deviance in behavior that provokes a conflagration of emotion, with indignation at the core;[144] *agency* suggests a core humanity consisting of the ability to form preferences, to act on them voluntarily, to choose one path rather than another, and ultimately to author, and thus be responsible for, one's own life story. *Demonic* provokes the passion for harsh punishment; *agency* gives us intuitive satisfaction, if not actual intellectual comfort, that we are genuinely doing justice. This contradiction usefully justifies mitigation waiver: if the defendant's crimes are expressions of autonomy (*agency*), then why not permit the defendant's next expression of autonomy (mitigation waiver), particularly since it is so congenial to the community's quest to punish and eradicate evil (to stamp out the *demonic*)?

From the defense perspective, mitigation-as-mercy often gets translated into the command that the capital defense lawyer must humanize her client.[145] What that means—*humanize?*—is not so clear, even among experienced capital defense lawyers, but the sentiment is universal. Wake up a capital defense lawyer in the middle of the night and ask, *what is your most important task in the penalty phase?*, and the response will be, *humanize my client.* Interlocked with this litigation mandate is the notion that it is harder to kill someone you regard as human than it is to kill one who has been dehumanized.[146] A major barrier to humanizing the defendant is the reality that the notion of demonic agency captures a resilient default reaction when we hear of a horrific crime.

B. THE HIDDEN ELEMENT IN DEATH-WORTHINESS: THE WORTHINESS *TO PUNISH*

To see how the notion of demonic agency powerfully influences capital sentencing in ways that are largely ignored—and thus to deepen our understanding of mitigation as something beyond just a mercy-inducing device—we must first step back and briefly consider the architecture of jury decisionmaking. Decreeing that another must die at the hands of the law involves not only a judgment about who the defendant is, *his* personal worthiness for life or death, but also a discernment, perhaps only a nagging sentiment, about our worthiness to impose death. There are, in short, two types of "worthiness" at work

144. For a critical discussion on deviance theory in criminal-law theorizing, see Robert M. Bohm, *Crime, Criminals and Crime Control Policy Myths*, *in* JUSTICE, CRIME AND ETHICS 327, 331 (Michael Braswell et al. eds., 1998).

145. *See* Goodpaster, *supra* note 125, at 302, 335.

146. *Id.* at 321 n.108.

here: worthiness to be punished and worthiness to punish.

Worthiness to be punished focuses the sentencer's mind on the defendant's criminal act, in this instance a brutal killing, unjustified and unexcused under the law, an act so horrific that the indignation aroused spurs the desire to execute the offender. Sure, we can speak of the offender's personal characteristics, his life history and circumstances, but in assessing worthiness *to be punished* with death they are mere factors considered alongside—indeed, in competition with—the gravity of the crime. Mitigation-as-mercy situates the mitigation presentation within this judgment about the defendant's personal worthiness to be punished. The thinking about mitigation as a concept usually ends right there.

But when we add in the other worthiness consideration, the worthiness *to punish*, we shift the inquiry in an important, destabilizing way. Worthiness to punish announces that culpability for the criminal act is not the only ingredient in calibrating punishment; there must be an entitlement to condemn. It reminds that deciding punishment involves a mutuality between sentencer and offender, between jury and defendant, between community and individual.[147] Worthiness to punish—understood as the community's sense of entitlement to feel the resentment and indignation that allows for punishment[148]—treats the criminal justice enterprise as a communicative endeavor, one involving a discursive practice that binds the accused and the jury.[149]

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147. *Cf.* DWORKIN, *supra* note 52, at 259 n.23 (arguing that "the vice of indignity" involves "a relation between those who show and those who are shown indignity").

148. The law concerning admissibility of victim-impact statements illuminates this understanding of the worthiness to punish. The notion of death worthiness limited to "worthiness to be punished" drives the Supreme Court's initial pronouncement on that issue: victim impact has nothing to do with the moral blameworthiness of the defendant because that cluster of considerations has nothing to do with the defendant's decision to kill and the act of killing. Booth v. Maryland, 482 U.S. 496, 502–06 (1987). But four years later the Court lifted the ban on victim-impact evidence in a penalty-phase proceeding. The Court essentially disavowed its earlier focus on moral blameworthiness as too narrow. The magnitude of harm, the breadth and intensity of suffering wrought by the defendant's killing, may be considered because the harm to and suffering of the victim's loved ones puts "moral force" behind the state's evidence. Payne v. Tennessee, 501 U.S. 808, 825 (1991). That "moral force" can only be the sentiments of indignation and outrage aroused by the crime that impel the desire to punish with death—that is, the community feeling of moral entitlement to kill. *See* Spaziano v. Florida, 468 U.S. 447, 469 (1984) (jury decisionmaking in capital cases is an opportunity for expressing the "community's outrage").

Justice Breyer's concurrence in *Ring v. Arizona*, 536 U.S. 583, 613–19, also reinforces the point in the text. Breyer joined in the decision to strike down Arizona's capital statute that put the death-eligibility decision in the hands of the judge rather than the jury not because judicial factfinding usurps power from juries in the abstract; but rather, because the jury *must* have ultimate control over the particular moral judgment whether to impose death. That judgment must reflect the community's particular sentiments of indignation and outrage—in my terms, the community's particular feeling of entitlement to impose death. To Breyer, the issue is not whether juries are better factfinders than judges. The issue is whether juries are better situated to divine an entitlement to execute an offender—and they are, according to Breyer, because they represent the collective. *Id.* at 615.

149. *See* R. A. Duff, *Law, Language and Community: Some Preconditions of Criminal Liability*, 18

In this communicative enterprise we cannot do otherwise but use ourselves as barometers, our values, our expectations, our self-understanding, our capacity for honest reckoning with our own fears and failings and vulnerabilities, our empathic capacities—a myriad of things, much of it unknowable, that concern who *we* are rather than who the defendant is—to formulate a settled moral confirmation that we are entitled to pass judgment.[150] Although a communitarian sense of worthiness to pass judgment comes into play most acutely in the capital-sentencing process, it pervades criminal jurisprudence. But because our legal discourse is so steeped in autonomy rhetoric,[151] we find ourselves sheepishly smuggling into the criminal justice process communitarian considerations of worthiness to punish.[152] Sheepishly, in part because we hesitate to accept wholesale any single autonomy-based justification for punishment. Neither deterrence nor retribution fully satisfy our appetite for moral justification. Blending them feels dishonest inasmuch as it smacks of resorting to *post hoc* rationalizations. Communitarian considerations of the worthiness to punish satisfy a deeper need, one of having our criminal laws *express* communal norms in a more

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O.J.L.S 189, 197–201 (1998); *cf.* Peter Aranella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511, 1544 passim (1992) (arguing that excuse defenses that deny the offender's status as a moral agent imply judgments about the offender's ability to participate in the community's particular practice of moral discourse). Indeed, it would seem that punishment, by its very nature, is communicative. It makes no sense to construe as punishment the imposition of some hardship on another without communicating that the hardship is connected to some attribution of blame. And that means punishment is conceptually linked to a process of adjudication.

150. *Cf.* Pillsbury, *supra* note 134, at 673, 696 (arguing that emotions do and ought to play a role in sentencing). Indeed, "[t]o insist that sentencers have no personal . . . feelings about the punishment issue, would come close to prohibiting the decision itself." *Id.* at 696.

151. *See* Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 HARV. L. REV. 959, 988 (1992) ("The law, especially criminal law, professes an individualistic ethic that allegedly precludes any form of collective responsibility."); George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L.J. 1499, 1503 (2002) ("A single methodology dominates the legal discourse of our time. Whether the talk is of law and economics, of constitutional law, of corrective justice, or of human rights, the methodology remains the same. What counts is individuals, their rights, their preferences, their welfare.").

152. Communitarian considerations of worthiness to punish must be smuggled into the process rather than openly discussed even though these considerations are deeply rooted in the Western tradition. The process of blaming expresses the community's indignation and resentment towards the offender. *See* R. A. DUFF, TRIALS AND PUNISHMENTS 39–73 (1986). If, as I maintain, indignation and resentment is only compatible with feelings of entitlement to condemn, then unadorned collective indignation and resentment cannot coexist with collective guilt or responsibility for the offender's act. The latter diminishes the former. How much depends on the particular circumstances. This line of thought calls to mind Plato's arguments for the community's imposition of lesser punishment in cases where criminal acts fail to bring about the harm that was intended. The community's entitlement to impose punishment, based on circumstances apart from the defendant's particular blameworthiness, may diminish the punishment that the wickedness of the offender's act seemingly calls for. *See* PLATO, COLLECTED DIALOGUES 305, 320–21, 838–39 (Edith Hamilton & Huntington Cairns eds., 1961).

sophisticated way than either deterrence or retribution theory can.[153]

C. A Deeper Understanding of Mitigation: Guilt, Collective Responsibility, and Capital Sentencing

What I now want to put forth is an idea that the autonomy-versus-reliability debate suppresses. In the capital context, the moral worthiness *to punish*, rather than the defendant's worthiness *to be punished* for having committed the crime, implicates repressed notions of collective responsibility, and in some instances, collective guilt.[154] To show what I mean, we need to unpack a bit more the process of capital sentencing. The conventional theory of mitigation surely has it right that the penalty phase involves a war between the forces that seek to dehumanize the defendant (and hence facilitate the entire process devoted to killing him) and the forces to do the opposite, to endow him with human qualities.[155] Needless to say, the humanizing process is calculated to morally engage the jury in the reality of what it is being asked to do. The decisional process is wrapped in the garb of kinship, a feeling of connection with the defendant—not because he is likable or someone with whom a friendship could be forged, but a more basic kinship, a recognition that he, too, is a human being with all the recognizable and relatable weaknesses and vulnerabilities that attach to being human. The conventional theory of mitigation understands this insight well, and effective capital-defense work depends on it.[156]

But stripping the defendant of the garb of kinship does something

153. *See generally* David Garland, Punishment and Modern Society: A Study in Social Theory 252 (1990) (discussing the expressive theory of criminal punishment, especially its meaning in terms of "power, authority, legitimacy, normality, morality, personhood, social relations").

154. I should make clear at the outset that I do not use the notions of "collective responsibility" and "collective guilt" to denote the attribution of primary responsibility for a crime upon a collective. For a discussion of "collective responsibility" in this strong sense, see Dan-Cohen, *supra* note 151, at 985. I have in mind a weaker meaning, one suggestive of a society's or community's breach of its fiduciary obligations towards a member such that the collective's entitlement to punish is affected. Although my argument here harmonizes with Dan-Cohen's contention that "one's social identity is a genuine constituent of the self" (*id.* at 986), I do not contend that mitigation functions in a way that Dan-Cohen says other criminal-law defenses function. Dan-Cohen characterizes criminal-law doctrines of involuntariness, provocation, and duress as "distancing devices," meaning that they serve to distance the accused from the harm that was caused by virtue of the accused's "refusal[] to identify" with that harm. *Id.* at 990. As the discussion that follows should make clear, mitigation in a capital trial (other than the mitigator of "residual doubt") ought not be understood as a statement that the defendant is not the author of the capital crime, and is therefore not responsible for it. Collective responsibility here is not used to *distance* the defendant from the crime, but to enhance our understanding of how the defendant has come to author it.

155. *See* Pillsbury, *supra* note 134, at 699 ("Prosecutors seek to dehumanize defendants while defense attorneys attempt the reverse.").

156. A capital-defense lawyer must lead jurors to "an empathetic understanding of [the defendant's] social history from a largely subjective perspective." Craig Haney, *Commonsense Justice and Capital Punishment: Problematizing the 'Will of the People,'* 3 Psychol. Pub. Pol'y & L. 303, 329 (1997).

far more powerful than just render the *evil perpetrator* as *the other*, a thing other than us, most emphatically *not us*. It brings on a sense that we, the community for which the jury is the proxy, are worthy to pass judgment, to say of the defendant that his innate capacity for redemption—a basic Judeo-Christian "truth"—either exists no more, or, even if it still lingers somewhere deep and inaccessible within the perpetrator, the nakedly evil act eclipses it.[157] The defense may have succeeded in awakening in the jurors the recognition that the defendant is a flesh-and-blood human being, but that may do nothing to ward off the jury's sense of moral worthiness to punish, a sentiment often nourished by the desire to protect the community. That is, the death verdict may reflect not so much the success of the prosecution to dehumanize the defendant, but the jurors' sense of entitlement to act in community self-defense. This is often the most powerful impetus for sentencing a defendant to death.

So, the prosecution's efforts to dehumanize the defendant works not so much on the logic of the defendant losing his entitlement to live—the horrific crime itself tends to accomplish that—but on the psychological level of creating a feeling of entitlement, a worthiness, to kill him. Put another way, what makes the prosecution's efforts to dehumanize the defendant such an effective weapon is that it permits jurors to disclaim responsibility for what the defendant did. To dehumanize imported Africans, for example, is to disclaim responsibility for all the evils wrought by slavery. So, too, with capital defendants. To dehumanize them is to disclaim any breach of society's fiduciary obligations to its citizens, to disclaim responsibility for the failings of our educational system, welfare system, child-protective services system, incarceration system, etc. To disclaim is to isolate. It is to treat the offender as a single autonomous being fully capable of exercising free choice, or at least capable enough to be regarded as the sole author of his violent act. And as sole author of his violence, the murder is properly seen as an expression of his being. Classic autonomy-based reasoning. Paradoxically, the relentless efforts to dehumanize the defendant, to sever his historical and current ties with the community, feed the notion that he is an *agent*, the agent within the notion of *demonic agency*.

See why prosecutors routinely respond to mitigation evidence with talk of the defendant's numerous opportunities to conform his behavior to the law? See why they drive home facts about the offender's many

157. The loss or retention of a redemptive capacity drives much of capital decisionmaking, just as it does philosophical debates about the moral legitimacy of the death penalty itself. *See, e.g.*, ALBERT CAMUS, *Reflections on the Guillotine*, *in* RESISTANCE, REBELLION, AND DEATH 230 (Justin O'Brien trans., 1974) ("We know enough to say that this or that major criminal deserves hard labor for life. But we don't know enough to decree that he be shorn of his future—in other words, of the chance we all have of making amends.").

rejected avenues for self-improvement, his failure to do what so many others have done—escape the hardships and oppressions of poverty and abuse and addiction and all the rest of what characterizes ninety-nine percent of capital defendants? The defendant, prosecutors like to say, exercised choice throughout his life, and the death-eligible crime is but the culminating choice, the choice to do evil. Arguments centering in one way or another on "choice" tend to be effective because, although jurors may feel moved by stories of extreme poverty, serious abuse, and other sorts of privations, they are not mitigating unless they somehow reduce the defendant's responsibility for what he did.[158] What I want to underscore here, though, is that prosecutorial arguments about "choice" speak to more than just the defendant's supposed *individual* failings as an autonomous being; they speak to the more compelling and deeper psychological point that society warrants no blame, no responsibility, and that we are therefore worthy to pass judgment because the proper allocation of blame is a single pipeline leading directly to the defendant. Laurel Fletcher and Harvey Weinstein speak of something similar, though in a very different context, when they observe that "individualized guilt may contribute to a myth of collective innocence."[159]

This single pipeline of blame is critical to establishing worthiness to punish. The blame for the crime is something the defendant must alone carry. The horrors of the crime, the ensuing anguish and wrenching sorrow—the defendant as demonic agent alone owns it all, and that often is enough to bring jurors to the point of voting for death. The whole idea of worthiness to punish does not even occur to us, so complete is our embrace of the Autonomy Ideal. "[D]emonizing the perpetrators of certain kinds of crimes gets the rest of society off the hook for attitudes and practices that are widespread but which implicitly promote and condone violence."[160] That is, the power of the notion of demonic agency is so complete that it suppresses even the thought of collective guilt, or of distributed guilt, or of collective responsibility; it suppresses our failures as a collective tied together in a socio-political and cultural network where in many ways, seen and unseen, we are responsible for the well-being of our fellow citizens, particularly our children. As one commentator puts it, "As a society . . . we persist in attributing free choice to the actions of those we find most deplorable and incomprehensible by distancing ourselves from any responsibility we may

158. *See* Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1539 (1998). Too often such evidence actually provokes a backlash, a rebellion by jurors against what they perceive to be "narratives of excuse." Alfieri, *supra* note 131, at 347.

159. Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUM. RTS. Q. 573, 580 (2002).

160. Haney, *supra* note 138, at 557–58.

have—not for the actions of the capital defendant—but for fostering an environment that reared the individual who committed those actions."[161]

The notion of demonic agency, then, severs any link between the defendant's violent act—most often a spasm, an eruption, of violence, not a systematic orchestration of violence we see exhibited by organized crime and governmental actors—and society's breach of its own fiduciary obligations to the individual. Society's failures lead to violence, broadly understood, inflicted on helpless children, who then grow up emotionally and cognitively stunted and thus debilitated in their ability to navigate a complex world, who then are inflicted later by the self-medicating violence of drug addiction and the warping effects of sick human relationships. Severing the link between the defendant's violent act and society's fiduciary breach is easy because the notion of demonic agency is easy to accept. Departing from it, undoing its grip, or just merely questioning it, is extremely difficult, even for those in the criminal justice business.[162]

Resurrecting the humanity in the defendant through an effective mitigation presentation ineluctably distributes responsibility across a wider network of social actors. A true focus on the individual defendant impels an investigation into the interdependence of the individual and the collective. No surprise, then, that the most effective way to resurrect the defendant's humanity is to tell the defendant's story of obstacles beyond personal control and of his adaptations, coping efforts, struggles, and failures in overcoming those obstacles.[163] The most effective mitigation presentation, the genuine aspiration for a penalty-phase case, and thus the core meaning of mitigation, must incorporate this story of adaptation, coping, struggle, and failure.[164] The crime is no longer just a

161. Francine Banner, *Rewriting History: The Use of Feminist Narratives to Deconstruct the Myth of the Capital Defendant*, 26 N.Y.U. REV. L. & SOC. CHANGE 569, 584 (2000–01). There has been some empirical work that gives limited insight into how jurors treat notions of collective responsibility when a mitigation case puts the idea forward. *See* Garvey, *supra* note 158, at 1565 (stating "notions of collective or societal responsibility for shaping the defendant's character played some role in jurors' capital sentencing decision, especially if it appeared that the defendant tried to get help for his problems but society somehow failed him").

162. *See* Haney, *Social Context*, *supra* note 138, at 551.

> [T]he broad sociological forces that constitute the larger context of the crime, the background and history of the defendant, and even the deeper psychological issues that help to account for why a particular crime was committed by a specific defendant, are complex questions that often elude even those charged with the responsibility of investigating and prosecuting the crime.

Id.

163. *See* Alfieri, *supra* note 131, at 347–48 n.143; Robin West, *Narrative, Responsibility and Death: A Comment on the Death Penalty Cases from the 1989 Term*, 1 MD. J. CONTEMP. LEGAL ISSUES 161, 167 (1990) (underscoring "the very real need to assign and then acknowledge both individual and societal responsibility for the consequences of actions").

164. *See* Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 STAN. L. REV. 1447, 1466 (1997) (The "defendant's final destructive

crime, but in a penalty-phase narrative a tragic culminating failure in coping.

This sort of storytelling in capital prosecution—a mitigation presentation that goes beyond appeals to mercy—is critical because it refutes the shallow prosecutorial appeals to autonomy with a more robust one: "Autonomy evaluates the offender's moral struggle—the extent to which forces beyond the offender's own desires impelled the choice to offend."[165]

1. Understanding Mitigation Through the Lens of Causation

We can speak of mitigation in causation terms, just as we can speak of free will and autonomy in causation terms.[166] Theorists, legal practitioners and judges sometimes puzzle over when a force that precedes and is linked to an event is deemed a cause of that event or a mere circumstance of it.[167] To use a famous example, consider how we treat the flicking of a lighted cigarette onto dry ground. Intuitively we treat the smoker flicking the cigarette as the cause of an ensuing fire; the dryness of the ground we treat as a circumstance.[168] Both are causes in a materialist sense. There is no *a priori* justification for excluding as a *cause* the circumstance that the ground was dry and thus susceptible to catching fire. We label the act of flicking the lighted cigarette a cause of the fire and the dryness of the ground a circumstance of it to reflect our attribution of responsibility. It reflects a societal judgment. The judgment of causation in the criminal-law context—and tort law, too—is an exercise, largely intuitive, in singling out what force (or less often, forces) to identify as the *responsible* agent for the occurrence. That entails a process of exclusion, the removal from our consideration a myriad collection of forces that always contribute to an occurrence. What gets excluded as a *cause*, as a responsible force to an occurrence, is evaluated outside logic.[169]

So, we might well ask, are poverty, childhood abuse and trauma,

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acts may be the culmination of failed struggles against enormous odds or a lifetime of attempts to overcome extraordinary barriers, disadvantages, and otherwise overwhelming circumstances.").

165. Pillsbury, *supra* note 134, at 695.

166. In fact, the concept of free will is best understood in causation terms. A person acts with "free will" when she acts causally without herself being caused to do so. *See* IMMANUEL KANT, *Passage from a Metaphysic of Morals to a Critique of Pure Practical Reason*, *in* KANT: POLITICAL WRITINGS 114 (H. S. Reis et al. eds., 1991).

167. John Stuart Mill said we pragmatically discriminate between "cause" and "mere background condition" in our everyday speech to attribute responsibility. JOHN STUART MILL, A SYSTEM OF LOGIC bk. III, ch. V, § 3 (4th ed. 1856). *See generally* JOEL FEINBERG, DOING AND DESERVING (1970).

168. For a discussion of hypothetical scenarios such as this, see H. L. A. HART & TONY HONORE, CAUSATION IN THE LAW 68–83 (2d ed. 1985).

169. *See* MILL, A SYSTEM OF LOGIC, *supra* note 167. The Model Penal Code, for example, suggests having the factfinder determine what is just when concluding that something is a "cause." *See* MODEL PENAL CODE §§ 2.03(2)(b), (3)(b) (1985).

drug addiction, and a whole range of other typical mitigation considerations *causal factors* to the criminal act or mere *circumstances* of it? Put another way, do we include or exclude it from our consideration of how and why the crime occurred? In treating these considerations as mere circumstances, too remote to be regarded as *causes*, we do not necessarily deny their power to influence behavior. We only mean to stand by the conclusion that the proper attribution of responsibility is with the defendant as the isolated autonomous agent.

The politics and moral judgments that flow from this linguistic categorization are crucial. Circumstances, we have come to think, can be and often are overcome by force of will. Circumstances are not destiny; they do not *necessarily* produce the shattering act of crime. This is the starting point of any analysis in criminal law, for the entire edifice of criminal-law doctrine is built upon the assumption that, except in the rarest of instances, human choices cannot be caused.[170] I do not intend to critique this stance but only to observe here that attribution of responsibility depends on it, depends in particular on socio-economic conditions being seen as mere circumstance, just as childhood trauma, addiction, low I.Q., poor schooling, and other conventional mitigation considerations are. These considerations—these circumstances, if you will—are the backdrop for the presumed operation of free will, autonomy, and the overall cognitive processes of choosing to do good or to do evil. And for that reason we are comfortable in saying that poverty, abuse, and the rest of it are linked to crime, that they create the conditions for crime, and that therefore—and this comes perilously close to using the word *cause*—that crime is a consequence of such circumstances, because that still permits us to talk of autonomy, of free will, of the capacity of the individual to choose to capitulate or overcome those circumstances.

But background conditions, what we might instinctively regard as mere circumstances to an event, can be linguistically elevated to being a "cause" based on the persuasiveness of other evidence. For example, suppose one flicked a cigarette on a ground saturated with flammable liquid rather than just dry ground. Now the cause-circumstance categorization shifts. The cigarette now becomes a circumstance and the saturated ground the true cause. Consider another simple hypothetical. Defendant and victim are in a scuffle on a cold winter night. The sidewalk is icy. Victim lands a hard blow. Defendant stumbles backward, reaches for his gun, slips on the ice and falls on his rump. Fearful because now in a vulnerable position, defendant fires his gun and kills the victim. No one would say that the ice patch caused the victim's death, even

170. *See* Stephen J. Morse, *Brain and Blame*, 84 GEO. L.J. 527, 530–37 (1996). *See generally* Stephen J. Morse, *The Moral Metaphysics of Causation and Results*, 88 CAL. L. REV. 879 (2000).

though a counterfactual scenario might suggest it was a cause (*i.e.*, if the ice patch were not there, defendant would not have fallen, and thus would not have fired the gun). The icy condition of the sidewalk was just that, a mere circumstance associated with the shooting.

But what if the victim lured the defendant to the icy spot so as to secure an advantage in the fight, only to have his scheme backfire? What if the lighted cigarette sparked a fire only because another person fanned the ignited brush? What if the capital defendant was raised by a psychopathic parent who abused him relentlessly throughout his childhood, aware of the risk of producing a replica of himself, another psychopath? The ice patch, the dried brush, the traumatic childhood—are these things now only mere circumstances? However one may answer these questions, the point is simply to expose the scalar quality of the cause-circumstance distinction. That scalar quality of causation is crucial to properly understanding mitigation. Whether something is mere circumstance or cause is itself a process of choice, a classification choice. Classifying the defendant's horrid life circumstances as mere circumstance involves distancing ourselves from him, washing our hands of any responsibility for the defendant's actions.

When mitigation is powerful enough that the jury classifies the life-history evidence as not circumstance but as causally connected to the crime, the crime itself recedes into being a circumstance of the defendant's life, part of a larger truth where social forces, institutional forces—the collective—become part of the decisional mix.[171] It is here that the mutuality of sentencing, of passing judgment, comes into play as a psychological force. So the image here is one of shifting focus, of certain things receding into the background and other things coming into view.[172]

All this is to say that *responsibility* is not a thing, an essence we can capture with some conceptual net. When we speak of *responsibility*, individual or collective, we speak of meaning being endowed, significance attributed, to some extent of our choosing, to consider this or that circumstance as important, as worthy of our attention. And so,

171. The point in the text is akin to one philosopher's observation that "the more *thoroughly* and *in detail* we know the causal factors leading a person to behave as he does, the more we tend to exempt him from responsibility." John Hospers, *Psychoanalysis and Moral Responsibility*, *in* THE PROBLEMS OF PHILOSOPHY 452 (William P. Alston & Richard B. Brandt eds., 2d ed. 1978).

172. It is too simplistic to disregard claims of fiduciary breaches by society as old-fashioned poverty-causes-crime rhetoric. My invocation of the idea of collective responsibility does *not* equate the individual's culpability with society's more abstract, more amorphous responsibility to its citizens; nor does it suggest the latter displaces the former. There are, as Karl Jaspers observes, different layers of guilt: criminal, moral, and metaphysical. KARL JASPERS, THE QUESTION OF GERMAN GUILT 31–32 (E.B. Ashton trans., 1978) (1947). While the individual may indeed be guilty in the "criminal sense," that does not resolve the other layers of guilt or responsibility that, I submit, bear on the distinct issue of entitlement to inflict a certain type of punishment.

mitigation works by expanding that cone of causation where a collection of forces becomes relevant, not as mere backdrop to the activities of an autonomous agent, but as a consideration that amplifies the notion of autonomy itself. The struggle over whether to treat mitigation evidence as more than mere circumstance is a struggle to understand the presentation of mitigation as something beyond a mercy-dispensing issue. It is to understand the entire project of presenting mitigation as an attribution issue, as part of the essential Eighth Amendment project of attributing the just amount of responsibility upon the capital defendant. While the pursuit of mercy may rightly be a prerogative of the capital defendant, the attribution task, the proper calibration of individual and collective responsibility, must be the irrevocable obligation of the sovereign.

2. Understanding Mitigation Through the Lens of Autonomy

Once we see that mitigation empowers the jury to accomplish this attribution task, where attribution in this context implicates the profound question of the collective's entitlement to impose death, then the Autonomy Ideal seems misplaced. We might overlook that fact—how it is perverse to use the Autonomy Ideal to dispense with the attribution question, since the attribution question itself brings to the fore issues about autonomy and collective responsibility—because we tend to get seduced into thinking that mitigation must be a counterpoint to the crime, a contest between aggravating factors and mitigating factors, *justice versus mercy*. Treating mitigation in this adversarial way seems natural because legal discourse resists incorporating, let alone understanding, notions of empathic knowledge.[173] And yet empathic knowledge is absolutely vital in capital sentencing because empathic knowledge infuses true substance into the idea of autonomy.[174]

When we strive to understand the forces that stunt the development of genuine autonomy, we do not slide into deterministic reasoning; nor do we deny the importance or legitimacy in building and committing ourselves to a discursive practice that privileges notions of autonomy and free will. We do not renounce the view that people act for *reasons* and

173. *Cf.* Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987). *See generally* JOHN NOONAN, PERSONS AND MASKS OF THE LAW 3–15 (1976); PLATO, THE REPUBLIC bk. V (G.M.A. Grube trans., 1974); JUDITH SHKLAR, LEGALISM (1964).

174. *See* Pillsbury, *supra* note 134, at 695 ("Autonomy relates to the offender's ability to choose between right and wrong, good and evil. Autonomy evaluates the offender's moral struggle—the extent to which forces beyond the offender's own desires impelled the choice to offend. Empathy supplies the motivation to take autonomy limitations seriously."). Pillsbury's project is akin to mine insofar as he strives to arrive at a way of thinking about retribution without resorting to notions of mercy, leniency, and forgiveness; instead, he investigates—rightly, in my view—a way of understanding just deserts that accommodates empathic considerations. *See id.* at 694 ("Aimed at moral understanding, empathy does not require or imply forgiveness. It simply strips away nonmoral reasons for blame.").

not merely from *causes*. We instead aspire to understand more deeply the defendant's actual autonomy—his autonomy in a *descriptive*, not an *ascriptive* sense—and thus more honestly respect his essential dignity as a human being, which is the anchor to retributive justice. What is thus significant in the "free-will versus determinism" debate is this, and this only: the controversy over free will—that is, the challenge to it posed by ideas of determinism—reflects a heightened consciousness of how enmeshed the self is in society and how profoundly influenced the self is by social and institutional forces. A mitigation case, when it is effective, creates an unsettled outlook towards free will by raising just this sort of consciousness. Beyond that, the "free-will versus determinism" debate is probably unresolvable and perhaps even ultimately fruitless.[175]

Understanding mitigation, therefore, is understanding what we earlier saw to be crucial to a full appreciation of "autonomy." Treated as a meaningful idea, autonomy is not an attribute of birth, as much legal theory and academic philosophizing would have it, but an acquisition gained over time, over many years of healthy social development, healthy development that depends on a healthy collective. Autonomy in a robust sense treats preference formations as socially constructed, shaped by institutional forces and impersonal circumstances. Autonomy presupposes an intact "self," one still connected to the "most basic aspirations of human beings [which is] the need to be connected to, or in contact with, what they see as good, or of crucial importance, or of fundamental value."[176] Mitigation necessarily spotlights this understanding of the "self," for "this orientation to the good is essential

175. *See* Peter Westen, *Getting the Fly Out of the Bottle: The False Problem of Free Will and Determinism*, 8 BUFF. CRIM. L. REV. 599, 601 (2005). *See generally* Thomas A. Green, *Freedom and Criminal Responsibility in the Age of Pound: An Essay on Criminal Justice*, 93 MICH. L. REV. 1915, 1917–19 (1995) (noting that the free-will-versus-determinism debate has been with us for hundreds of years). More attention has been paid to this debate than any other in philosophy. *See* Westen, *supra* at 599. Robert Nozick found the free-will-versus-determinism debate "the most frustrating and unyielding of problems." ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 293 (1981). It may well be that we cannot coherently distinguish between free will and determinism in a way that accords with any observable reality. *See* NAGEL, *supra* note 61, at 112–13; *cf.* Thomas Nagel, *Moral Luck*, *in* FREE WILL 174, 177 (Gary Watson ed., 1982) (our individual identity and attributes are largely a matter of "luck," thus problematizing our justification of imposing blame). I am inclined to side with the philosopher Arthur Schopenhauer: free will and determinism may both be true, but if pressed too hard, these ideas render themselves incoherent. *See* ARTHUR SCHOPENHAUER, PRIZE ESSAY ON THE FREEDOM OF THE WILL 98 (1999) (speech delivered in 1839 where Schopenhauer argues that freedom of will exists, but the nature of an individual's "willing" derives from a self that is largely determined by outside forces); Westen, *supra* at 601–02. For an interesting discussion of determinism and the act of willing, see Wolf, *supra* note 62, at 137. For a discussion of determinism generally, see ROBERT KANE, THE SIGNIFICANCE OF FREE WILL 95–96 (1996); Steven Goldberg, *Evolutionary Biology Meets Determinism: Learning from Philosophy, Freud, and Spinoza*, 53 FLA. L. REV. 893 (2001); Westen, *supra*.

176. CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF MODERN IDENTITY 42 (1989).

to being a functional human agent."[177] Socially constructed preference formations, an intact "self" meaningfully connected to a pursuit of something of fundamental value, autonomy understood as implying some degree of critical self-awareness—these are the conceptual ingredients that reveal how it is that the collective is mingled with the individual.

These conceptual ingredients are the conceptual foundation for a mitigation presentation, for "[t]he community is . . . constitutive of the individual, in the sense that the self-interpretations which define him are drawn from the interchange which the community carries on."[178] What a mitigation presentation therefore *shows*, when it is most effective, is that the abusive and traumatic experiences of the child who grew up to become the capital defendant occurred amidst society's failure to protect that child.[179] What an effective mitigation presentation *does*, when it is most effective, is "suggest a powerful indictment of our legal, social, and educational systems that failed to recognize [the defendant's] disabilities at a point in time when it could have made a difference."[180] Collective responsibility is internal to the very idea of mitigation.

Mitigation is therefore not a mercy-driven counterpoint to the crime. Its target is indifference. Outrage will always be there. It is a losing proposition to present mitigation in the hopes that mercy will soothe the outrage. Mercy cannot *mitigate* the crime itself. All that can be done is to overcome the indifference that that outrage produces—indifference towards the actual person that sits at the other end of the room, which means an indifference towards how and where that person fits within the larger community.[181] Targeting indifference has nothing essential to do with mercy or forgiveness.

Still, although collective responsibility is internal to the very idea of mitigation, narratives of collective responsibility do not occur naturally in mitigation presentations, for two reasons. First, we too often fail to

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177. *Id.*; *see also* CHARLES TAYLOR, PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS 213–15 (1985).

178. CHARLES TAYLOR, HUMAN AGENCY AND LANGUAGE: PHILOSOPHICAL PAPERS 8 (1985); *see* MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 179–82 (1982); *cf.* NOZICK, PHILOSOPHICAL EXPLANATIONS, *supra* note 175, at 501 ("The choices that are viewed as significant and central to a person's life and self-definition may vary from culture to culture . . . .").

179. Haney, *Social Context*, *supra* note 138, at 575.

> [I]nstitutional failure is another theme that is prominent in the lives of capital defendants—ranging from the lack of desperately needed intervention to intervention that is ill-conceived, poorly and inadequately funded and staffed, to intervention that is terribly destructive of the human spirit . . . . [N]owhere is the damage of institutional failure clearer and more painful to contemplate than in the case of children who are confined by agencies of social control, only to have that experience worsen, sometimes irreparably, the very problems their incarceration was designed to remedy.

Id.

180. Crocker, *supra* note 128, at 1002.

181. *See* Pillsbury, *supra* note 134, at 696 (noting that a life verdict involves jurors seeing "the offender as a member of their community," which prompts them to "care[] about him").

sharpen our meaning when we speak of responsibility and guilt. We rebel at the idea of collective responsibility and guilt because we assume it denotes a sort of culpability attributed to society that is akin, or even equivalent, to the culpability we emotionally want to attribute to the guilty defendant.[182] We can avoid that conceptual error if we understand that responsibility and guilt can be a consequence of political affiliation.[183] This is guilt in an associative sense, guilt that "adhere[s] to the nation as such and not to the individual members."[184]

Second, narratives of collective responsibility and guilt, of distributed blame, discomfort us intellectually because we are locked into a false dichotomy between deterministic accounts of human conduct (rooted in the sentimentalism of victimization theory) and the tough-minded rhetoric of autonomy and free will.[185] When courts invoke the notion of autonomy (or its proxy terms, like free choice, free will, dignity), they presume to put a label on something real, something palpable, some reified notion that is deemed worthy of protecting. But the labeling short-circuits thought because the labeling permits courts to invoke a rhetorically powerful idea to accomplish an outcome that is most congenial to the smooth functioning of the criminal process. There is no such thing as free will independent of some understanding of a

182. Not all guilt is the same. When a jury announces a criminal defendant "guilty" after trial, it is not just stating a finding; it is declaring a state of affairs between the defendant and the community, one that opens the way for the community to inflict punishment. A person may feel guilty even when no rational community would adjudicate the person guilty. Consider William Styron's character Sophie, in *Sophie's Choice*. *See* WILLIAM STYRON, SOPHIE'S CHOICE (Vintage Int'l 1992) (1979). Sophie is racked by debilitating guilt at having relinquished her daughter to certain death at the hands of the Nazis. But she was in no way blameworthy for doing so. Her own subjective guilt—a "moral guilt," to use Karl Jaspers' terminology (*see* Fletcher, *supra* note 151, at 1530–32)—is entirely distinct from her juridical guilt.

183. Professor Fletcher's discussion of Karl Jaspers' notion of "political guilt"—"Everybody is co-responsible for the way he is governed"—captures the idea well:

> [Political guilt] attach[es] even in cases of living under dictatorships where it is not humanly possible to avoid the inhuman actions of those in charge. Political guilt is borne by each person in a political community merely by virtue of being there and being governed. . . . [P]olitical guilt derives from identification with the society and being there at that time.

Fletcher, *supra* note 151, at 1531.

184. *Id.* at 1540. Fletcher's discussion of associative guilt occurs in the context of international affairs, which is unsurprising. Efforts to take into account the environment in which an individual's horrendous conduct occurs is not at all uncommon in the international arena, where international criminal tribunals are often urged to consider the "coercive environment" as a context to understand the criminality. Accused persons in war-crime trials sometimes argue that cataclysmic events and the associated breakdown of the social order diminish—even destroy—their personal control and responsibility over their actions. *See* Fletcher & Weinstein, *supra* note 159, at 605–10. What distinguishes that situation from the typical capital-punishment situation is that the former often involves criminality that does not violate a social norm, but actually promotes it. Nazi Germany provides the most evident illustration, where mass killing and torture promoted the Nazi social order. Collective responsibility and guilt are strongest in that setting.

185. *Cf.* Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 596 (1981).

deeper self that is capable of reflection and self-revision. That deeper self—the self-revising, reflective self—is vulnerable to being, and often is, warped by institutional and other outside forces; sometimes it is warped so badly that we cannot rightly impose full responsibility upon that person's freely willed action to inflict harm on another.[186]

A powerful mitigation case can—indeed, must—free us from this false dichotomy of autonomy versus determinism. It frees us by doing what a skilled literary novelist does, one who strives to tell the truth through fiction rather than engage in kitsch sentimentality that marks most fiction. Skilled novelists are at war with the abstract, fighting to expose false dichotomies. They show not that we are utterly free, immune from the controlling or deterministic forces of social institutions and culture; nor do they, with some possible exceptions (I have in mind Franz Kafka), go in the opposite direction, portraying human beings as utterly helpless in the face of overpowering institutional and other social forces. They show our need as human beings to be *connected* to the outside world, connected with others in authentic relationships. Autonomy and free will and responsibility cannot be divorced from this crucial human need for connectedness. And that is precisely why there always exists the interrelationship of the individual and the collective, an interrelationship that gives true meaning to the mitigation case.[187]

Think, for example, of Richard Wright's *Native Son*, the story of an unremorseful killing, and consider whether any engaged reader would endorse Bigger Thomas's execution. That's mitigation.[188] Wright brings the reader into Bigger Thomas's life, not to render him a pawn of social forces, but to link his particular moral agency with our own, to trap us into casting a judgment on ourselves should we dare judge him.[189] And so, as readers, we avoid the trap; we avoid it because we understand that we

186. *See* Wolf, *supra* note 62, at 148. "Hard determinism"—the philosophical aversion to free will—threatens the idea of responsibility inasmuch as free will is understood to be crucial to finding individuals to be responsible for their acts. *See generally* Goldberg, *supra* note 175, at 898 (discussing "hard determinism"). But in the death-penalty context, the issue is not whether the capital defendant lacks responsibility for the crime; rather, the issue is whether the defendant's conceded responsibility for the crime warrants the extreme sanction of death. *See* Roper v. Simmons, 543 U.S. 551, 572–73 (2005).

187. *Cf.* SCHOPENHAUER, *supra* note 175.

188. Bigger's crime, as a prosecutor would portray it: the unremorseful suffocation, decapitation, and incineration of a young woman, followed by a plan to frame an innocent man for that killing and to extort money from the victim's wealthy parents through a bogus ransom note, and then the rape and killing of another young woman. RICHARD WRIGHT, NATIVE SON, 98–108, 120, 128, 213, 269–77 (HarperPerennial 1989) (1940). Unremorseful is actually too mild a characterization of Bigger's emotional response to the first killing. "Elation filled him." *Id.* at 120. He felt "more than amply justified" in what he'd done. *Id.* at 128. The second killing apparently did not emotionally register at all.

189. Had Wright simply told a tale of deterministic forces manipulating a deprived black youth, readers would have rightly rebelled at the bald suppression of the norm of moral agency, a norm that few in our free-will-obsessed society are willing to reject completely.

do not have the entitlement to judge, implicated and invested as we are in Bigger Thomas's being-in-the-world.

I commend *Native Son* as a literary exemplar of a mitigation case because skilled, experienced death-penalty advocates understand that a mitigation presentation must be constructed in ways akin to how a literary novelist constructs a tragic story. Like so many compelling stories, a powerful mitigation case tells the story of individual human failings within the context of societal failings, binding the individual and the collective, and thus telling us of our unworthiness to cast full blame on the individual, for we as a society have partaken in the crime.[190]

A powerful mitigation case, therefore, combats the impetus to understand the trial as merely a forum for assessing blame on a single, autonomous individual. The penalty phase of a capital case becomes a forum for distributing blame, for speaking of collective responsibility. It becomes a forum for a different kind of truth, not the "microscopic and logical truth"[191] that criminal trials produce through highly ritualized processes. Rather, it becomes a forum for "experiential and dialogic truths"[192] that speak to the defendant's experience as a being-in-the-world, a being with an inner life influenced and often corrupted by institutional forces that benefit some and harm others. The forum thus invites a broader consideration of guilt, one deeply ensconced in Judeo-Christian culture, where "guilt (*asham*) is understood as something like a stain, a form of pollution on the people."[193] If the criminal act pollutes the moral order, thus necessitating cleansing through punishment, it is fair to ask in response, *was the moral order polluted already such that the criminal act grew out of it?* And if so, what sort of cleansing is called for?

Through sentiments of collective responsibility—perhaps even inklings of collective guilt—jurors confront another kind of violence, one

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190. Fletcher's discussion of collective guilt gestures at this idea of mitigation, though he situates his discussion not in the context of capital cases, but in the very different context of punishing Nazi war criminals like Adolph Eichmann in an international war-crimes tribunal. Fletcher suggestively observes:

> Considering the guilt of the nation in the sentencing process would provide a concrete and practical way to recognize collective guilt in criminal trials. Recognizing the mitigating effect of the nation's guilt would mitigate the responsibility of the offender, though perhaps in many cases this guilt would remain sufficiently grave to justify severe punishment.

Fletcher, *supra* note 151, at 1539. Fletcher later muses, "If the dominant systems of belief encourage actions like . . . lynchings, gay bashings, or domestic violence, those who succumb to violence are certainly to blame, but one has to wonder whether they alone are to blame and whether they must bear the guilt alone." *Id.* at 1541. Fletcher thus concludes, albeit tentatively, that "those who generate a climate of moral degeneracy bear some of the guilt for the criminal actions that are thereby endorsed." *Id.* at 1541–42.

191. Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221, 1283 (2000).

192. *Id.*

193. Fletcher, *supra* note 3, at 170.

beyond the horrors of the crime, which renders the defendant eligible but not necessarily worthy of a death sentence. It is the violence of the execution itself, a culminating act of community violence inflicted upon one who has been defeated by a past replete with inflicted violence, some (maybe even much) of it community inflicted, throughout a lifetime of struggle and failure. This added confrontation with violence is essential to effective death-penalty advocacy, and so it is a key ingredient in any fair understanding of mitigation.[194]

The focus on the individual defendant, and keeping outside of the discourse any thought of collective responsibility or collective guilt, while a symptom of the hold that autonomy has upon us, actually degrades the humanity of the defendant—precisely the opposite of what we would expect in adhering to the Autonomy Ideal. Once again let us note the irony. The worthiness to punish, the moral justification for executing the defendant, rests on the notion that the defendant acted with the quintessential attribute of autonomy—the capacity for reason and free choice. And yet that not-so-tacit conclusion depends upon the jury seeing the defendant as less-than-human, as dehumanized. The Autonomy Ideal drives the justification for punishment and then operates against those very considerations that serve to humanize the offender and thereby diminish the justification for punishment. Volunteering for execution at the stage where the jury must decide worthiness for death is no emblem of autonomy, even though we get seduced into allowing that act of volunteering in the name of autonomy, for it is an act of capitulation, laden with shame and defeat.

CONCLUSION

The rhetoric of autonomy and dignity have a hold on us in a way that collective guilt and collective responsibility do not, because we are embedded in a culture that is not just built on notions of autonomy and dignity, but is defined by them. The classical Western Enlightenment understanding of language is that it is a naming process, that there are cognitive processes that preexist language and the need to communicate the fruits of those processes calls for the use of language. Language is a mere tool, and it is something we control.[195] But, as we have seen from the post-modernist assault upon this classical view of language,[196] there is

194. *Cf.* Austin Sarat, *Violence, Representation, and Responsibility in Capital Trials: The View from the Jury*, 70 IND. L.J. 1103, 1124 (1995) (observing how capital jurors receive a skewed presentation of violence—the violence of the crime overwhelming, if not eclipsing, the violence that the law allows through a death verdict).

195. *See* STEVEN PINKER, THE LANGUAGE INSTINCT 44–74 (1994).

196. *See* John K. Simon, *A Conversation with Michel Foucault*, 2 PARTISAN REVIEW 201 (1971). *See also* LUDWIG WITTGENSTEIN, ON CERTAINTY (Denis Paul & G.E.M. Anscombe trans., Harper Torchbooks 1972) (1969).

no preexisting cognitive process, no thinking that precedes language. We do not *use* language so much as we *are* language.[197]

So, when I say that the rhetoric of autonomy and dignity have a hold on us, I do not merely suggest that scholars, judges and lawyers are simply enamored with that rhetoric. I am suggesting that we are manipulated by it. When the *Faretta* Court spoke of autonomy as the "lifeblood of the law," it was not adjudicating a philosophical debate over whether free will or determinism mirrors the actual world. It was gesturing towards Herbert Packer's assertion that the ultimate function of law "in a free society [is to] promot[e] human autonomy and the capacity for individual human growth and development."[198] When we speak of autonomy in the context of legal discourse, we do not—because we cannot—stake a claim about the human species as some definitive fact. We do not mean to say that all persons have the developed capacity to genuinely and authentically author their own destinies or that all life choices are freely made or that deterministic social and impersonal forces do not exist. "Human autonomy is an illusion if we make it conditional on human perfection."[199] The discourse of autonomy within the broader discourse of criminal law stems from our aspirations, the cluster of values, shifting and reconfiguring constantly, that we have chosen to pursue through legal doctrine. It is not a metaphysical assertion about free will or about the paraphernalia of some real world that exists outside ourselves. It is a position we have chosen to take, a stance that allows us to anchor the development of doctrine. The development of criminal-law doctrine treats autonomy *as if* it were real and then we as a culture manipulate ourselves into thinking it is real.[200]

We manipulate ourselves in this way by forgetting that we have *chosen* long ago to anchor our doctrinal developments in the criminal law in the Autonomy Ideal, not for metaphysical reasons, but for value-preference reasons, a preference to pursue a particular vision of the social good. We proceed *as if* autonomy and free will actually exist as real things, but then are blind to how such notions take over, how we become used by the terminology. Imprisoned, if you will, by our language.

Getting trapped into the limiting view of mitigation as a mercy-inducing device is a symptom of what these remarks are gesturing at. Viewing mitigation this way, of course, stacks the deck in favor of

197. Simon, *supra* note 196 (noting that Michel Foucault asserted we are determined in our thinking by the very language we use). This idea, though fashionable in an age of post-structuralism, has roots in Rousseau. *See generally* ROUSSEAU, ON THE ORIGIN OF LANGUAGE (John H. Moran ed. and trans., F. Ungar Pub. Co., 1966).

198. PACKER, *supra* note 15, at 65.

199. *Id.* at 66.

200. *Id.*

allowing a capital defendant to veto a mitigation presentation. The argument against allocating that power to capital defendants who wish to express their autonomy by waiving mitigation cannot be dressed up to foster the impression that it is about promoting sentencing reliability, for that merely begs the question, *why isn't reliability vindicated by a reliable death-eligibility determination, coupled with the unfettered opportunity for the defendant to seek mercy or leniency through a mitigation presentation?* Nor can the argument be couched in terms of protecting society's commitment to the *Lockett* principle, where a capital sentence is ideally imposed after an adversarial penalty-phase proceeding has taken place,[201] for that argument effectively violates the Kantian principle that an individual ought not be treated as a means to a social end.[202] To be sure, we might get around the Kantian objection by reframing the *Lockett*-principle argument, putting it in terms of the inalienability of the rights guaranteed by the Eighth Amendment. [203] But that approach has two problems: one, it conflicts with *Lockett* itself, which speaks in terms of promoting sentencing reliability through the *opportunity* to present mitigation;[204] and two, it lapses back into the question-begging argument noted earlier—namely, *why must society recognize procedural rights as inalienable?* Resort to an inalienability argument, it seems to me, reflects an unwillingness to chart a path towards understanding mitigation as something not belonging to the defendant. The only option to avoid this impasse is to reject the cramped, though conventional, view of mitigation.

The way out, as I see it, after years of capital defense work and thinking about effective capital-defense advocacy,[205] is to understand the myth of demonic agency as the flip-side of what might be called the "myth of collective innocence."[206] The struggle to transcend the hold these myths have on us so they do not drive our use of the death penalty is what mitigation must ultimately be about. This is mitigation beyond the realm of mercy. This is mitigation that goes to the core of the moral legitimacy of capital punishment, which is not whether a killer deserves execution, but whether we are entitled to kill. This is mitigation understood as a process of creating an unsettled consciousness on that profound question of entitlement. This is mitigation understood as something that belongs to the jury, delegates of the community who must

201. *See* Carter, *supra* note 20, at 105–06 (arguing against mitigation waiver, relying principally on the *Lockett* principle).

202. KANT, GROUNDWORK, *supra* note 54, at 154–55.

203. *See generally* Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1852 (1987) (stating "inalienability negates the possibility of separation" of the right from the holder of that right).

204. Lockett v. Ohio, 438 U.S. 586, 605 (1978).

205. *See* DANIEL R. WILLIAMS, EXECUTING JUSTICE: AN INSIDE ACCOUNT OF THE CASE OF MUMIA ABU-JAMAL (2001).

206. *See* Fletcher & Weinstein, *supra* note 159, at 580, 604.

decide the community's entitlement to kill, not the capital defendant who seeks to smother it.[207] This is mitigation that takes aim at *us*, the collective, for it is we who must do the killing, we who must remain vigilant guardians of dignity.[208] Arguments about paternalism, therefore, are entirely misplaced,[209] for the Autonomy Ideal ought not form the philosophical foundation for keeping the jury—the stand-in for the collective—from addressing its own entitlement to kill. Allocating that power to a capital defendant—no matter how thoughtful the mitigation-waiver decision might be—patently denies that effective mitigation reveals a capital crime to be both an individual act of evil and a social failing, the culmination of a social phenomenon for which we all bear responsibility in a deep associative sense.

The position I have staked out here could be defended at a higher level of abstraction. Penalty-phase litigation, we might say, is a contest over conceptual schemes—one hinging on ideas about individualized blame and the competitor scheme hinging on ideas about exogenous forces and influences that undercut or diminish blameworthiness. How we describe these competing conceptual schemes is less important than seeing that the decisionmaking endeavor involves a contest between them. The act of choosing between conceptual schemes—whether in the pressure-cooker of death-penalty deliberations or in faculty lounges—is an act of embracing an integrated system of values. And when the conceptual schemes involve contested matters of social existence, the values we are talking about are necessarily *moral* values. It is no surprise, then, that we understand the jury's sentencing judgment in a capital case to be a moral one. The integrity of that act of choosing between conceptual schemes is not something over which a capital defendant ought to have ultimate control. Influence? Sure, but that is just a consequence of the practicalities associated with litigating any case—litigants have the personal power to withhold their own testimony and

207. The difficulty in presenting a powerful mitigation case should be apparent. And it should be apparent why a plea for mercy—and indeed, even to hinge a case for life on the plea for mercy—is the weakest form of advocacy in a capital case, short of no advocacy at all. The defendant is in no position to ask for mercy, and the jury really has no compelling reason to grant it. In fact, granting mercy for many jurors smacks of disrespecting the victim, something prosecutors routinely remind jurors of. *Where was the mercy when the defendant plunged his knife into the helpless victim, stabbing her repeatedly as she gasped her last breaths, clinging to life.* More fundamentally, mercy is at odds with mitigation in the sense that mercy depends on a recognition of guilt and moral desert for punishment. The most powerful mitigation dilutes guilt, distributes it beyond the individual defendant, and thereby calls into question exactly what does the defendant deserve. Mercy, in short, implies the person deserves to die, but for reasons aside from just deserts he should be spared that fate.

208. *See* DWORKIN, LIFE'S DOMINION, *supra* note 52, at 259 n.23.

209. *See supra* note 135 (noting the paternalism objection to disallowing mitigation waiver); *cf.* Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963, 970–71 (1987) (arguing that antipaternalism rooted in individualism fails to account for dignity-based impositions on individuals rooted in entitlements belonging to the community and not the individual).

the potential power to influence others to do the same. But to remove from the jury's consideration the meaningful consideration of competing conceptual schemes is something altogether different.

Finally, there is the useful illusion. The notion of promoting autonomy by allowing defendants to waive mitigation reinforces an illusion that society is willing to entail costs in respecting individual freedom, a useful illusion that bolsters our image of nobility as a society. But the ugly truth is, the Autonomy Ideal in this setting is a rhetorical device to arrive at a result that promotes order, fluidity, and uniformity in the capital sentencing process—attributes of capital jurisprudence that the Supreme Court has for almost two decades regarded as most important.[210] We have the doctrinal tools to deal with a mitigation waiver: insist upon a detailed colloquy between the judge and the defendant to ensure that the waiver is knowing, voluntary, and intelligent; inquire vigorously into competency; and then proceed with the penalty-phase proceeding with all the trappings of the adversarial process intact (prosecutorial argument, jury charge, jury deliberation). Legitimacy is achieved through process and our professions of freedom are vindicated by a tough-minded fidelity to autonomy.

By contrast, we do not have ready-made tools to smoothly deal with disallowing mitigation waivers. Any response committed to getting mitigation evidence to the jury over an objecting defendant would be messy.[211] And whatever mitigation evidence finds its way to the jury without the defendant's cooperation and endorsement would necessarily be a partial evidentiary presentation. And that's the rub, isn't it? If reliability is what we are after—whatever that means—then how much mitigation is enough mitigation to inspire confidence that the outcome is *reliable*? Might a court-mandated partial presentation provoke destabilizing thoughts that no mitigation presentation—even those with full support by the defendant—is a *full* presentation? Isn't it better to cram such uncomfortable questions in the dark attic, away from our doctrinal fetishism over fair process?

Allowing mitigation waivers supposedly acknowledges the paramount importance of autonomy while conveniently sweeping such questions under the blanket of adhering to the elaborate procedural rules governing capital prosecution.[212] That process fetishism, which the *Ashworth*-type argument exemplifies, projects the illusion of institutional

210. *See* WELSH S. WHITE, THE DEATH PENALTY IN THE NINETIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT 207 (1991) (observing that "maintaining the smooth functioning of our system of capital punishment is a higher priority [to the Court] than protecting the rights of capital defendants").

211. *See* Carter, *supra* note 20, at 149 (discussing possible solutions and their difficulties).

212. *See generally* Steiker & Steiker, *supra* note 84, at 357–59 (arguing that the procedural labyrinth of capital jurisprudence legitimates capital punishment).

competence. And that illusion elides the uncomfortable truth that believing we can get enough information to adjudicate death worthiness when we are dealing with the complexities of human existence may be the epitome of arrogance. Trying to give the jury enough information to resolve the unresolvable may well be a fool's errand, for the goal of reliable sentencing may be utterly unattainable.[213] So, disallowing mitigation waivers threatens to expose how absurd the enterprise is. But by allowing it, the criminal justice system propagates the image of a process that accords defendants with all the rights that are needed to justify the enterprise and reinforces the image of a society respectful of individual liberty and, through the sheer force and seduction of rhetoric alone, dedicated to the ideal of autonomy.

213. *See* STEPHEN NATHANSON, AN EYE FOR AN EYE: THE IMMORALITY OF PUNISHING BY DEATH 90–94 (2d ed. 2001).

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